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IN THE

Supreme Court of the United States

October Term, 1963

NO. 283

ORKIN EXTERMINATING COMPANY, INC.,
Petitioner

v.

GULF COAST RICE MILLS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas, entered in the above-entitled cause Number 13,998 in such Court on November 8, 1962.

OPINIONS BELOW

The opinion of the Court of Civil Appeals herein sought to be reviewed, is reported in 362 S.W. 2d. 159. An earlier opinion, upon the first appeal of this case to the Court

of Civil Appeals for the Tenth Supreme Judicial District of Texas, was reported in 343 S.W. 2d 768, and the appeal from that decision was dismissed in an opinion by the Texas Supreme Court in 347 S.W. 2d 250.

JURISDICTION

The judgment sought to be reviewed herein was rendered and entered by the Court of Civil Appeals for the First Supreme Judicial District of Texas on November 8, 1962.

A Motion for Rehearing was overruled by that Court on November 29, 1962. Application for Writ of Error to the Supreme Court of Texas was refused by the Supreme Court of Texas on March 6, 1963. A Motion for Rehearing was overruled by the Supreme Court of Texas on April 10, 1963, from which date Petitioner has ninety days, or until July 9, 1963, within which to file this Petition.

The jurisdiction of this Court is invoked under 28 U.S. C.A. 1257(3).

From the final judgment of the Court of Civil Appeals, after Motion for Rehearing was overruled by that Court and Application for Writ of Error was overruled by the Supreme Court of Texas, Petitioner has no further appellate remedy under the laws of the State of Texas. This Court has held that where a Texas Court of Civil Appeals entered its judgment, and the Texas Supreme Court refused application for writ of error, an appeal to this Court is properly taken from the Court of Civil Appeals, in *Michigan-Wisconsin Pipeline Company v. Calvert*, 74 S. Ct. 396, 347 U.S. 157, 98 L. Ed. 583.

Review is also being sought herein by appeal, and this Court is respectfully asked to consider this Petition in conjunction with the papers filed pursuant to the Notice of Appeal bearing the same caption as this Petition.

QUESTIONS PRESENTED

1. Is the judgment of the Texas Court of Civil Appeals, holding that food may be condemned under Section 342 (a) (1) of the Federal Food, Drug and Cosmetic Act and under "pure food laws" of the State of Texas and of the City of Houston, upon the basis of a jury finding that "any" amount of a pesticide chemical may render such food injurious to health, in violation of the Supremacy Clause (Art. 6) of the Constitution of the United States, and therefore inoperative, by virtue of a clear collision between such judgment and the regulation promulgated by the Secretary of Health, Education and Welfare which provides that such food containing ten parts per million of such pesticide chemical shall not be considered unsafe under Section 342 (a) (2) (B) of such federal Act?

2. Are the "pure food laws" of the State of Texas and the City of Houston, which provide, as construed by the Texas Court, that food may be condemned upon the basis of a jury finding that "any" amount of a pesticide chemical may render such food injurious to health, in violation of the Supremacy Clause (Art. 6) of the Constitution of the United States, and therefore inoperative, by virtue of a clear collision between such "pure food laws" and the regulations promulgated by the Secretary of Health, Education, and Welfare which provide that such food containing ten parts per million of such pesticide chemical shall not be considered unsafe under Section 342 (a) (2) (B) of the Federal Food, Drug and Cosmetic Act?

3. Does such judgment of the Texas Court, upon the basis of such jury finding, constitute an invalid usurpation by the State judiciary of federal legislative and administrative power, in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, in view of the power delegated by Congress to the Secretary of Health, Education and Welfare, and the administrative regulations promulgated thereunder which provide that such foods containing ten parts per million of such pesticide chemical shall not be considered unsafe under Section 342(a)(2)(B) of the Federal Food, Drug and Cosmetic Act?

4. Does such judgment of the Texas Court constitute a denial of rights and immunities guaranteed by the Fourteenth Amendment of the Constitution of the United States, by denying the right of food processors to rely upon administrative regulations promulgated by the Secretary of Health, Education and Welfare which provide that processed food containing ten parts per million of such pesticide chemical shall not be considered unsafe under Section 342(a)(2)(B) of the Federal Food, Drug and Cosmetic Act?

5. Does Section 342(a)(1) of the Federal Food, Drug and Cosmetic Act, as so construed by the Texas Court, constitute an unreasonable and arbitrary delegation of power to the judiciary in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States?

6. Do Sections 342(a)(2)(A) and 346 of the Federal Food, Drug and Cosmetic Act which provide, as construed by the Texas Court of Civil Appeals, that a processed

food may be condemned upon the basis of a fact-finding by such Court that a pesticide chemical contained in such food is not a "required" poison as that term is used in such Section 346, constitute an invalid delegation of legislative power to the judiciary and a denial of due process in violation of the Fifth Amendment of the Constitution of the United States?

7. Does the judgment of the Texas Court, holding that Section 346 of the Federal Food, Drug and Cosmetic Act is effective and enforceable upon the basis of findings by such Court as to whether this Petitioner's pesticide chemical is a "required" poison within the provisions of such Section, constitute a denial of due process and of rights and immunities guaranteed by the Fourteenth Amendment of the Constitution of the United States, by denying this Petitioner the right to have an administrative finding of such fact, to be made by the Secretary of Health, Education and Welfare as to whether such pesticide chemical is a "required" poison, before this Petitioner becomes subject to such Act?

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND ORDINANCES

The following are quoted in the APPENDIX:

Fifth Amendment, U.S.C.A. Constit. Am. 1-13.
Fourteenth Amendment, U.S.C.A. Constit. Am. 6-14.

21 U.S.C.A. Sections 342(a), Clauses (1) and (2)(A) and (2)(B), page 373.
21 U.S.C.A. Section 346, pages 418-419.
21 U.S.C.A. Section 346(a)(1), page 420.

21 C.F.R. (1955) Section 3.41, page 55.
21 C.F.R. (1955) Section 120.101(b) and (c)(2), pages 230-231.

21 C.F.R. (1955) Section 139.101(e) and (f), pages 219-220.

Article 707, paragraph (c)(5), Volume 2, Vernon's Ann. Penal Code of the State of Texas, pages 37-38.

Article 4472 in 12A Vernon's Ann. Civil Statutes of the State of Texas, page 325.

Section 868(c) paragraph (5) in City Code of Houston, Texas, 1942, at page 454.

STATEMENT OF THE CASE

I. *Procedural History of the Case*

Respondent sued petitioner, in an ordinary damage suit upon theories of negligence and breach of contract, for damages incurred by respondent in obeying compliance orders issued by Federal and State food inspectors and city health inspectors. Respondent claimed that petitioner was legally liable for the consequences of such violations. After one jury trial and an appeal therefrom in which this suit was remanded for retrial, a second jury trial resulted in a District Court judgment for respondent upon a jury verdict finding petitioner negligent.

This District Court judgment was affirmed by the Texas Court of Civil Appeals in the opinion herein presented for review. Petitioner's motion for rehearing in such Court was overruled, and petitioner duly filed its application for a writ of error to the Supreme Court of Texas, which was refused by the Supreme Court, endorsed "Refused"—no reversible error" on March 6, 1963. Petitioner's motion for rehearing was overruled by the Supreme Court of Texas on April 10, 1963, after which action this petitioner had no further remedy for appellate review in the State courts of Texas.

II. *Facts Material to the Questions Presented*

(Parenthetical references, "S.F.", are to trial court's STATEMENT OF FACTS in the record presented with this Petition.)

The incident from which this suit arose occurred on August 24, 1955, at the Gulf Coast Rice Mill, when a Federal Food and Drug Administration inspector found that respondent's milled rice contained traces of a pesticide chemical, Lindane, which he believed to be prohibited for use upon such rice by the Federal Food and Drug Act (S.F. 48, 64, 75, 132, 401-402). The federal inspector declared the rice contaminated and adulterated (S.F. 402). The opinion of the Texas Court of Civil Appeals, presented herein for review, correctly states the facts in this connection: 362 Southwest 2d at Page 162. The quantity of Lindane found in the rice ranged from zero (S.F. 284-285, 290) to 3.6 parts per million parts of rice (S.F. 286-288). The inspector threatened to seize the rice if it were shipped (S.F. 75).

The Federal Food and Drug Administration had been given authority to establish "tolerances", regulating amounts of pesticides used in foods, in 1938 by Section 346 of the Federal Food and Drug Act; however, this power was not exercised and Section 346 remained in disuse. In 1954, the Pesticide Amendment to the 1938 Federal Food, Drug and Cosmetic Act was passed, authorizing the Administration to establish tolerances for the use of pesticide chemicals upon "raw" agricultural commodities (Clause (a) (2) (B) of Section 342, Title 21 U.C.C.A.). The Administration began fixing such tolerances in 1955, but had not set any tolerance for the use of Lindane upon rice (or any

other "grain" in its raw state) as of the time of the inspection and compliance orders given by the Federal inspector on August 24, 1955.

Local state and city inspectors also advised respondent that its rice was adulterated under the law, and would have to be cleaned by remilling in order to be brought into compliance with state statutes and city ordinances (S.F. 74-75); the facts in this respect are correctly stated by the Texas court below. The respondent acceded to the orders of all officials and incurred damages in the sum (not disputed by petitioner) of over $36,000 (not including interest) in bringing its rice into compliance with the food statutes of the federal, state and city governments (S.F. 61-62). Respondent thereafter, nearly two years after such incident (1 Transcript 2), filed this suit against petitioner to recover the money incurred in obeying such compliance orders, alleging that it had necessarily obeyed such inspectors' orders under such threats of prosecution (1 Transcript 2-11).

Respondent's allegations in its suit set forth a negligence action in the usual form and also actions for breach of warranty and breach of contract, which alleged not only breaches based upon the use of the Lindane, but also based upon faulty methods of insect control allegedly causing the same damage (1 Transcript 4-11). Pleading in reply thereto, petitioner alleged a general denial and only such affirmative defenses, i.e. statute of limitations, laches, estoppel, waiver, and contributory negligence as was required by Texas Rules of Pleading (1 Transcript 13-19).

In a jury trial, respondent introduced evidence of faulty insect control (S.F. 65-66) as well as of the government inspectors' administrative findings of adulteration by the

"prohibited" pesticide chemical (S.F. 75). While no evidence of any other administrative finding by the federal inspector was adduced, there was testimony offered by the Director of the Division of Food and Drugs, Department of Health for the State of Texas, that his Department was prepared to take action against respondent on account of the presence of the Lindane (S.F. 278) and that in his scientific opinion, any amount of Lindane in such rice "might render it injurious to health", no matter what the amount [S.F. 298-299]. Medical witnesses also testified that trace amounts, as little as .06 parts per million, might have rendered the rice "injurious to health" (S.F. 305-310, 311-315).

The jury verdict was upon special issues finding that the Lindane "may have rendered the rice injurious to health", that the application of it by petitioner was negligence, and that such application was a proximate cause of the damages claimed (1 Transcript 53-56). The jury verdict is quoted in the judgment rendered thereon, and such Trial Court judgment is appended hereto as APPENDIX "D". Judgment was entered on the verdict alone, and without any legal conclusions or findings of law (1 Transcript 54-59).

Petitioner asserted the only grounds appropriate under Texas law as grounds for its motion for judgment non obstante veredicto, to-wit: that there was "no evidence" to support the verdict and that all pleadings and evidence showed that no cause of action had been made out. (1 Transcript 45-50).

There being no findings made against petitioner with respect to its having been guilty of violations of any food or health statutes or other law, petitioner appealed from

such judgment by relying upon its motion for a judgment N.O.V. upon the theory that no cause of action had been made out in tort or contract (BRIEF FOR APPELLANT ORKIN EXTERMINATING COMPANY, pages 1 and 44).

The Court of Civil Appeals (Houston) affirmed.

The judgment of the Court of Civil Appeals complained of herein was based upon two legal conclusions:

1. "Since no tolerance for Lindane on milled rice as applicable to the facts of this case had been established by the Secretary of Health, Education and Welfare, the addition of any amount of Lindane to such milled rice was in violation of Section 342. (a) (2) of the Federal Food, Drug and Cosmetic Act, and especially so if it may have rendered the rice injurious to health." (Opinion, at 362 S.W. 2d 164, paragraph (1, 2)).

2. "* * * There is substantial evidence showing that Lindane in any quantity on rice may render such article injurious to health." (Opinion, at 362 S.W. 2d. 163, last paragraph).

These legal findings of law violations, the first such findings made by any person or agency since those made on August 24, 1955, against Respondent, were contested by Petitioner in its Motion for Rehearing in the Court of Civil Appeals (Houston) upon the following grounds (a certified copy of original MOTION FOR REHEARING is contained in the record filed herewith):

(1) The holding that "there is substantial evidence showing that Lindane in *any* quantity on rice may render such article injurious to health" violates the Constitution

of the United States in that it conflicts with the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder. (paragraph 1 of such Motion).

(2) The holding that the evidence supported a finding that .02 to 3.6 parts per million of Lindane may have rendered the rice injurious to health, violated the Constitution of the United States in that it conflicts with the Federal Food, Drug and Cosmetic Act (paragraph 2 of such Motion).

(3) The holding that no tolerance had been established for Lindane, and that therefore any quantity of Lindane was prohibited as being possibly injurious to health, conflicts with the Federal Food, Drug and Cosmetic Act, and thus violates the Constitution of the United States (paragraph 3 of such Motion).

(4) The holding that a jury fact question was raised, by evidence of Lindane in the rice in amounts ranging from *none* to 3.6 parts per million, conflicts with the Federal Food, Drug and Cosmetic Act and therefore violates the Constitution of the United States (paragraph 4 of such Motion).

(5) The holding that state and city laws were violated by application of Lindane in such amounts was in conflict with the Federal Food, Drug and Cosmetic Act, and therefore violated the Constitution of the United States; Further, such holding conflicts with federal statutes which have pre-empted regulation of such matters, and such holding violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that it is arbitrary, unreasonable and discriminatory (paragraphs 5, 6 and 7 of such Motion).

(6) There is no evidence to support any cause of action and a verdict should have been directed and judgment rendered for Defendant (Petitioner) (paragraphs 8-11 of such Motion).

Petitioner's Application for Writ of Error to the Texas Supreme Court asserted the constitutional questions as follows:

POINT 1: The Court of Civil Appeals erred in holding that Section 346 of the federal food laws was applicable herein, and that since no tolerance for Lindane had been established thereunder, the rice was adulterated under Section 342(a)(2) of the federal law.

POINT 2: Such Court erred in construing Section 346 of the federal food laws as applicable herein, when such statute so construed is unconstitutional as being an invalid delegation of legislative power to the judiciary under the United States Constitution and the Court's construction constitutes a usurpation of legislative power.

POINT 3: Such Court erred in construing Section 346 of the federal food laws as applicable herein, when such statute so construed is unconstitutional as being a denial of due process of law under the United States Constitution.

POINT 4: Such Court erred in holding that "any" amount of Lindane on milled rice may render such rice adulterated under either federal, state or city food laws, because such holding is a judicial act in conflict with federal law in an area pre-

empted by the federal government and is therefore in violation of the Federal Constitution.

POINT 5: The Court of Civil Appeals erred in holding that there was substantial evidence supporting the jury's finding that Lindane in "any" quantity on rice may render it injurious to health and thereby adulterated under Section 342(a)(1), where there was no evidence to support such holding.

POINT 6: Such Court erred in construing Section 342(a)(1) as being violated by the presence of "any" amount of Lindane to the rice, because such statute so construed is unconstitutional as being an invalid delegation of legislative power to the judiciary under the United States Constitution and the Court's construction constitutes a usurpation of legislative power.

POINT 7: Such Court erred in holding that there is substantial evidence showing that Lindane in "any" quantity on rice may render it injurious to health, because such adjudication is an unconstitutional denial of due process by such State tribunal in violation of the Fourteenth Amendment of the United States Constitution.

POINT 8: Such Court erred in construing the state statute and city health ordinance as rendering the rice adulterated by the presence of "any" quantity of Lindane, because such statute and ordinance so construed are unconstitutional as being in conflict with the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder, in violation of the United States Constitution.

POINT 9: Such Court erred in construing the state statute and city ordinance as rendering the rice adulterated by the presence of "any" quantity of Lindane thereon, because such statute and ordinance so construed are unconstitutional in that they deny due process of law in violation of the United States Constitution.

POINT 10: Such Court erred in construing the state statute and city ordinance as rendering the rice adulterated by the presence of "any" quantity of Lindane thereon, because such statute and ordinance so construed are unconstitutional in that they deny Equal Protection of law in violation of the United States Constitution.

III. ***Federal Question Was Raised Timely Below in Appellate Court:***

Petitioner relies upon the exception to the general rule that the Federal question must be raised in the trial court to be timely, in that the federal questions raised in this case were presented for the first time by the rulings of the Texas Court of Civil Appeals, as stated in *Herndon v. Georgia*, 55 S. Ct. 794, 295 U.S. 441, 79 L. Ed. 1530, rehearing denied 56 S. Ct. 82, 296 U.S. 661, 80 L. Ed. 471, by Mr. Justice Sutherland:

> "Petitioner, however, contends that the present case falls within an exception to the rule—namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the

ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it."

Mr. Justice Cardozo carefully analyzed this exception to the general rule in his dissent in the *Herndon* Case, and phrased the rule in this language:

> "The settled doctrine is that when a constitutional privilege or immunity *has been denied for the first time* by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely". (Emphasis added)

While the *Herndon* decision held that the federal question was not raised timely under the facts therein, that decision was based upon the undisputed circumstance that the Georgia statute therein questioned had previously been construed, shortly before petitioner's opportunity for challenging it in the trial court, by the Supreme Court of the State of Georgia in another lawsuit. But the majority opinion by Mr. Justice Sutherland noted the fact that in the appeal to the State Supreme Court in the other lawsuit "the court in substance construed the statute as it did in the present case", and therefore the petitioner in the *Herndon* case should have anticipated what the state appellate court would do in his suit.

In the case at bar, the facts were exactly the opposite. After the first trial of this case, the judgment for respondent was reversed upon the first appeal herein, and this reversal by the other Texas Court of Civil Appeals, sitting at Waco, Texas, was based upon a construction of these federal statutes herein involved contrary to the construc-

tion placed upon them by the Houston Court of Civil Appeals in the second appeal. While there were differences in the evidence in the second trial, the statutes and alleged violations were the same; as the Houston Court said at the outset of its opinion at page 161 in 362 S.W. 2d, the respondent's pleadings "were identical on both trials". Thus this Petitioner was faced with the same claims as to which statutes had been violated, and the manner in which they had been violated. The Waco Court's opinion (Appendix "B"), was quoted by the Houston Court's opinion as having been based upon the same essential fact with respect to whether the Lindane could have rendered the rice injurious to health, namely the fact that such rice had contained quantities of Lindane ranging "from *none* up to 3.6 parts per million parts of rice", and the Waco Court held "that such amounts are not injurious to health, in any manner".

The extraordinary nature of the litigation at bar is such that there was never any legal ruling or order issued by any government official to which this Petitioner could possibly have objected, until such rulings and orders were made in the opinion of the Houston Court of Civil Appeals. The original administrative rulings made by the food inspectors in 1955 were not even directed to this Petitioner. The charges leveled against petitioner by the respondent in its lawsuit were only the widely assorted allegations of various breaches of civil duties that are customary in "shotgun pleadings" designed to cover every possible cause of action that respondent might be able to prove by the evidence. Petitioner complied with Rule 94, Texas Rules of Civil Procedure, in specially pleading every af-

firmative defense required under such Rule. Petitioner was not required to anticipate the construction to be placed by the Court upon each one of the statutes alleged in respondent's pleading, and to plead that it would be unconstitutional if so construed. The basic federal statute involved, Section 342 of the Federal Food, Drug and Cosmetic Act, had been held constitutional *as written*, and Petitioner herein only claims now that it is unconstitutional as construed by the Houston Court of Civil Appeals. Petitioner "was not bound to contemplate a decision of the case" before the verdict was reached, nor to anticipate how the Courts would construe the statutes alleged. *Saunders v. Shaw*, 244 U.S. 317, 320, 61 L. Ed. 1163, 1165, 37 S. Ct. 638.

Petitioner could not even anticipate *whether* the Court would construe many of the statutes alleged in respondent's pleading. For example, two statutes were alleged inconsistently as having been violated; a finding of a violation of Section 346a, 21 U.S.C.A., would have to be based upon a finding that the milled rice was a "raw" agricultural commodity. Respondent had alleged that the rice was subject to such Section, and even, in the second trial, offered an inspector's testimony that milled rice was a "raw" commodity (S.F. 298-299). At the same time, a violation of Section 346 of that Act was also alleged, and the respondent thus sought a ruling that the rice was a "processed food" in spite of its own proof to the contrary. Petitioner could not reasonably be expected to speculate as to every possible construction of every one of the dozens of inconsistent statutes alleged in the hope of guessing the one ultimately to be applied by the Courts.

ARGUMENT

I. Summary of Argument

Two rulings form the basis for judgment below. They are combined in this single statement by the Houston Court of Civil Appeals:

> "Since no tolerance for Lindane on milled rice as applicable to the facts of this case had been established by the Secretary * * *, the addition of any amount of Lindane to such milled rice was in violation of §342(a) (2) * * *, and especially so if it may have rendered the rice injurious to health."

The first holding is based upon the absence of a tolerance under Section 346 (although possibly the Court referred also, in this particular passage, to Section 346a—this will not seriously affect the ultimate issues).

The second holding apparently was only secondary in view of the words "and especially so * * *." This one is based upon the possibility of injury to health, and applies equally to the state and city laws as well as federal statutes.

The answer to the first holding is this: Section 346 was not in force at the time of the incident, and never has been in effect except as to one isolated case which occurred many years ago; only one tolerance was ever promulgated under this section, and it is an impossibility, physically and legally, for this section to become effective as to any pesticide or food until the Administrator makes the necessary findings.

To the second holding we answer: Federal regulations sanction the presence of up to 10 parts per million of Lindane on many foods, including rice after it has been

processed and "when ready to eat," and this sanction precludes any state or city agency, whether legislative, judicial or administrative, from establishing or enforcing a more strict regulation of either pesticides or foods.

II. The Application of Section 346 of the Federal Food and Drug Act, as Construed by the Court below, Renders Such Act Invalid and the Court's Judgment Invalid, Under the Due Process Clauses of the 5th and 14th Amendments and under the Supremacy Clause of the Constitution of the United States.

This holding of the Court below rests upon two bases:

(1) The addition of any poisonous or deleterious substance to food, for which no tolerance had been established by the Secretary under Section 346, was prohibited if *thereafter* it could be proven that such substance was not "required" and "could have been avoided."

(2) The evidence *now* shows that Lindane was never known (by respondent) to have been used before or after the incident involved herein, and therefore it was "not required" and "could have been avoided" within the meaning of those terms as used in Section 346.

The basic food statute involved is the "adulteration" statute, §342(a) which establishes various *types* of tests whereby food may be determined—either by a Court alone, or by a Court acting upon fact-findings of an Administrator—to be adulterated.

Clause (1) of such Section is a *self-executing* provision which sets out a *relative* test by which a Court, alone, may determine whether a food is adulterated. Clause (2)

is in prospective terms (*not* self-executing) which sets a different type of test—an absolute standard—whereby a Court may determine whether a food is adulterated by reason of its failing to meet certain fixed standards which are to be promulgated by "the Administrator."

By the self-executing provision of Clause (1) the Legislature has given the Judiciary the power to determine whether a deleterious substance may have rendered a food injurious to health whenever a Court has found that such substance has been added to such food in *sufficient quantities* to have such effect.

The second provision, Clause (2) of the general adulteration statute, differs from the first in that it attempts to supply absolute tests to be used in certain cases. However, as is usually necessary in a statute which classifies things in considerable detail for the purpose of fixing absolute standards of conduct, it incorporated provisions of §346 which set up administrative practices to complement its general terms. Section 346 contains directions to the Administrator to promulgate regulations by which its general provisions may be given effect. The legislature thus delegated its own legislative power to the Administrator to "fill in the details" of this clause which defines adulteration in certain areas, i.e., where the use of added substances in food is "required" by *economic conditions* and *general industrial practices*. The *Administrator* was thereby given the duty to *investigate and ascertain the conditions* under which some deleterious substances (such as economic poisons) might be regulated by absolute tests in the form of "tolerances" to be enacted as administrative regulations.

Thus, the jurisdiction of the Judiciary to adjudicate food as adulterated under §346 is limited to their determination of whether a given food bears a quantity of a deleterious substance which *exceeds* a tolerance fixed by the Administrator. But *until* such a tolerance has been fixed by the Administrator, the Courts have no jurisdiction to apply such section at all, in any case; or perhaps it is better to say that there is nothing in that section to apply to any facts. §346 is *not operative* to any "food" or to any "substance" until a tolerance has been promulgated for such food and substance. This section is simply not in effect as to such foods or substances.

No court decision has been reported holding that §346 is applicable where no tolerance has been set, and this would be the natural result if all administrative officials have interpreted the section to be inoperative without administrative findings as to what poisons are "required." This is the correct interpretation under the evidence of the legislative intent as shown by arguments of legislators in Congress. In urging these legislators to pass the 1938 Act, Secretary Henry A. Wallace sent a message to Congress showing what he understood to be the intent of that Act as then framed (and as later enacted) as respects the prospective portions of it, saying:

> "* * * Because of the complex and technical nature of the subject matter involved a number of the most important definitions of adulteration and misbranding are incomplete and must have their clearly stated outlines filled in with scientifically accurate details before they can be enforced. The bill delegates to the Secretary of Agriculture the quasi-legislative power to ascertain the necessary technical facts and supply the details that will complete the definitions

thus effectuating the legislative will." Volume 83, Part 7, *Congressional Record*, Page 7779, for the 75th Congress, 3rd Session (May 31, 1938).

Petitioner submits that the only way §346 can, or ever could have been, enforced is by a method as follows: (1) The Administrator would consider scientific evidence concerning industrial conditions, during public hearings, and would then decide upon such facts whether a given substance was "required" or "could not be avoided"; (2) Whenever he were able to reach a decision upon those two matters (if ever), he would establish a tolerance for such substance on given foods; (3) *Thereafter*, whenever the government found a food containing a substance listed among those with tolerances so established, it could convict the food as "unsafe" under § 346 by showing that the quantity exceeded the tolerance.

In the case at bar, the Court has made the findings that the administrative agency was given the power to find, and thereby the Court below has usurped legislative functions that were validly delegated by the legislature to the Administrator. Petitioner believes the Court has thus misconstrued §346 and its holding, resting solely upon such misconstruction, is erroneous. If the legislative intent were otherwise, and the statute has been properly construed, then the statute is unconstitutional because it affords no reasonable guide for a court's determination of what is "required" or "could not be avoided" and thus invalidly delegated uncontrolled legislative power to the courts; further, it denies due process of law in providing for civil and criminal punishment upon arbitrary, capricious and unreasonable grounds, as here, for example, where the Respondent has succeeded in convicting itself by merely

introducing testimony that *it* can get along without the Lindane and therefore, *it* felt that the Lindane was not "required" and "could have been avoided."

After the enactment of the 1938 Act, members of Congress gave evidence of the legislative intent of that Act by pointing out its omissions and deficiences, in their arguments for enactment of amendments thereto. On January 11, 1954, an address by Congressman A. L. Miller (Nebraska) in the House of Representatives, urged the early passage of the "Miller Amendment" (also known as the "Pesticide Amendment"), giving these reasons:

> "The *present procedure for establishing tolerances* involves the holding of a public hearing *at which time* evidence must be presented to show: First, the use of the pesticide chemical *is necessary* in the production of food; second, the amount of residues remaining in or on the food; and, third, toxicity data upon which tolerances adequate to protect the public health may be established.
>
> * * *
>
> "The bill which I introduced is designed to *remedy this defect* by providing a simple, more appropriate procedure to establish tolerances for pesticide chemicals and to *prevent* the use of the new pesticide chemicals *until such a tolerance as needed has been established.*" Volume 100, Part 1, *Congressional Record*, Page 153, for the 83rd Congress, 2nd Session. (Emphasis added)

Congressman Miller made it clear that he was sponsoring the new bill because, under the "present procedure" (1954), a tolerance could not be established until after an administrative hearing wherein the *Administrator* would make the fact-finding that a *given* pesticide chemical "is *neces-*

sary". This obviously refers to the provision for the finding of "required" and unavoidable as those conditions are stated in § 346. He was sponsoring this amendment in 1954 in order to do away with the procedures of the 1938 Act (in § 346) by which the Administrator was supposed to make fact-findings of the *necessity* of certain substances. His bill in 1954 was limited to apply only to "raw" commodities so its provisions were not applicable to the Respondent's milled rice in the case at bar; however, it did pass (it is now 346*a*) and thereby it did show that the "impracticable procedures" for determining whether substances were "necessary" under the 1938 Act were being remedied, at least as to raw commodities (while "processed" food remained subject to the procedures of § 346 of the 1938 Act). Thus, his bill does "prevent the use of the new pesticide chemicals *until* such a tolerance as needed *has been* established" through administrative procedures, and this was "designed to *remedy* this *defect*" of impracticable procedure which had been holding up the operation of § 346. The operation of § 346 still had to wait, for its enforcement upon "processed" food such as milled rice, until the Secretary could determine which economic poisons were "required".

Since no prosecutions upon this issue have been undertaken under § 346 in reported cases, we must rely upon its legislative history to see that it did *not* "prevent the use of the new pesticide chemicals" *until after* the necessity for the use of each one has been established *administratively*.

Excerpts from the Congressional Record prior to the enactment of Section 346, showing this legislative intent, include the following:

1. August 7, 1935 — Address by Congressman Hoeppel urging passage of the 1938 Food and Drug Act (Senate Bill 5) in which the numerals 302(a)(2) and 304(a) correspond to present Sections 342(a)(2) and 346(a):

"The provision of the present law against added poisonous substances in foods in amounts which may render them injurious to health does not effectively guarantee the safety of our food supply, and is awkward, cumbersome, and uncertain of enforcement. There is no provision in the law which authorizes the fixing of tolerances. Even when identical issues are involved in different jurisdictions the Government must bring to each court trial the foremost toxicologists of the country to present their testimony, and that testimony must show that in the amounts the particular food is consumed it may, because of the added poison, be injurious to the health of the consumer, irrespective of the amount of poison the consumer may ingest from other foods. The *courts and juries* are not authorized to take into account the *need* for the use of the poison in the production of the food or the *practicability of avoiding* contamination with the poison in manufacturing operations.

"* * * The provisions of Section 703 set forth the careful, methodical way in which tolerances will be formulated after a full public hearing. By these provisions it is insured that tolerances will be based upon all available scientific facts; that in their establishment there will be due deliberation; that they can be promptly altered with the discovery of new scientific facts; that the most liberal limits will be provided for those commodities where, at present, added poisons are unavoidable; and that public health will be effectively protected." Volume 79, Part 12: *Congressional Record*, Page 12665, for the 74th Congress, 1st Session. (Emphasis added).

An exhaustive examination of the legislative history of the 1958 Act (Malkan, "Pesticide Residues: A study in federal law", 52 U.C.L.A. Law Review 511, Vol. 2, No. 4, of June 1955), reviews the reasons for the failure of the Secretary to conclude its hearings upon tolerances, and concludes that § 346 became operative only after the Secretary had made findings as to *which* pesticides were required for particular foods; it is then stated therein (p. 519) that:

> "When tolerances have *not* been set, the government *must fall back on the general prohibition* of 402(a)(1) — (of the Bill, which is 342(a)(1) of the Act), and public protection becomes subject to the difficulties noted under the *1906* Act." (Emphasis added)

As a matter of logic, it is impossible that § 346 was intended to leave to the judiciary the determination as to whether a substance is required or unavoidable. It expressly states that *"when* such substance is so required or cannot be so avoided, the Administrator *shall* promulgate" tolerances for it. If the Administrator waits until a jury or a court in a given case has found that a substance was not required, or was avoidable, then he *never could* set a tolerance for that particular substance on that food. If he waits until the jury or court has found it *is* required, or unavoidable, the prosecution under this section is over before he could act thereunder. There could *never* be, a prosecution based upon proof that a tolerance was *exceeded*.

In conclusion, the Court below should have held that, since no tolerance had been set under § 346 for Lindane on rice, the government's threatened prosecution (against the Gulf Coast Rice Mill, Respondent) would have had

to fall back on the *general* prohibition of the *1906* Act—i.e., on the "injurious-to-health" provision of § 342(a) (1) —and on this alone.

If § 346 has been correctly construed, then it is unconstitutional as an invalid delegation of legislative power to the judiciary. Unlimited discretion is thus granted whereby courts can find any pesticide to be either "required" or not, or to be "avoidable" or not, without any reasonable legislative guide for its decision. It would also be unconstitutional as a denial of due process because it arbitrarily classifies as prohibited any pesticide that any person may feel, as a matter of personal preference, to be not "required" or to be "unavoidable", and no classification or distinction of degree having a rational basis need be used in such decision. For both of these reasons such section as construed and applied by the Court below is in violation of the federal constitution.

III. The application of Section 342(a)(1) of the Federal Food and Drug Act, and of the state and city laws, as construed by the Court below, prohibiting the presence of "any" amount of Lindane in processed food, violates the Due Process and Equal Protection Clauses of the 14th Amendment, and the Due Process Clause of the 5th Amendment, and the Supremacy Clause of the federal Constitution.

If the food and pesticide industries follow federal sanctions, the entire public of the United States may ingest Lindane directly with its everyday food in ready-to-eat form with at least 42 daily foods such as common fruits and lettuce. See C.C.H. Food, Drug, Cosmetic Reporter, Vol. 4, pages 1781-1830, and the 42 tolerances listed in Federal Register for March 11, 1955.

Lindane is one of the common-place economic poisons, the Gamma Isomer of Benzene Hexachloride, which means it is the "pure" B.H.C. and is given a tolerance of *10 p.p.m.* in all instances where "commercial B.H.C." is given a tolerance of 5 p.p.m. (21 C.F.R. 120, 101(b) and (c) (2)) Lindane has a tolerance of 10 p.p.m. on "Grain (from treating storage bins)" under Section 341, Title 21 C.F.R. (1955). This was established on October 31, 1955, and meant that unmilled rice was allowed to have that tolerance, since is a grain.

It is true that all of these tolerances were promulgated under the "raw agricultural commodity" provisions, §346*a*, and that such section does not apply to milled rice in the sense that prosecutions can be brought under such section. But the logic or rationale of the Court of Civil Appeals' ruling that 346a is not applicable in that respect, and that for this reason "no tolerance had been established" for milled rice *under* such section, supplies no reason for ignoring the *fact* that such section provides the sanction for the *reality* that Lindane may be eaten with food every day. The regulation explaining the practical application of §346*a* states this in express terms:

> "Where raw agricultural commodities bearing residues * * * which are within a tolerance permitted under §408 (meaning 346a of 21 U.S.C.) are used, the *processed* foods will *not* be considered *unsafe* within the meaning of 406 (meaning 342(a)(2) if * * * the poisonous or deleterious pesticide residues have been removed to the extent possible in good manufacturing practice and (2) the concentration of the pesticide in the preserved or processed food when *ready to eat* is not greater than the tolerance permitted on the raw agricultural commodity." (21 C.F.R. 120.1 (f) (Emphasis added)

Thus, any unmilled rice containing Lindane will be deemed safe if it contains 10 p.p.m. after milling. The federal administrative agencies actually recommend the use of Lindane in raw food in these amounts. The reason for the use of pesticides is to rid food of filth and infestation and the massive effort of the Federal Food and Drug Administration includes affirmative steps in providing this sanitation. The only scientific means of ensuring such sanitation in food is to encourage the use of these posions. Thus, so long as Lindane is used in such amounts that leave only permissible residues in the processed food, it is used not only by sanction but in furtherance of the public policy which is evidenced by this administrative effort.

Apparently the Court of Civil Appeals did not reject these factual aspects of the "raw" commodity amendment merely because the tolerance for grain had not been established prior to the date of the threatened prosecution (which, in effect, constituted the damage complained of by Respondent). The Court noted that such amendment, §346a, "was in full force and effect in August, 1955". Further, the Court *actually did apply* that section to this case when it held that "*Since* plaintiff's grain had been milled and was *not* a raw agricultural commodity, no tolerance had been established for it". The time of the establishing of such individual tolerance could have no bearing upon *whether* the ingestion of "any" amount of Lindane was *in fact harmful*. In any event, the tolerance (21 C.F.R. 3.41) that was established for Lindane on "grain" (which includes unmilled rice) was effective on October 31, 1955, when Respondent was just getting started in remilling its grain (S.F. 118). So it is indisputable as a matter of law that the very rice the Respondent was remilling on October 31 (see S.F. 118, 84-117)

could have contained 10 p.p.m. of Lindane "when ready to eat" and it would have been considered "safe" by the Federal Food and Drug Administration.

The Court below made no mention of section 120.1 (f) which permits Lindane to be present in milled rice "when ready to eat." But this regulation constitutes a part of the statutory law of the United States which cannot be ignored; it must be judicially noticed and respected. Since the federal government has pre-empted the field of government regulation of food sanitation, at least in that portion of such field wherein fixed tolerances are the method of regulation, its regulations are the supreme law of the land. This judgment of the Court of Civil Appeals and the statutes enforced by it are in direct and positive conflict with such regulations and are therefore unconstitutional. *Oregon-Washington R. & N. Co. v. Washington*, 270 U.S. 87, 70 L. Ed. 482, 46 S. Ct. 279; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 86 L. Ed. 754, 62 S. Ct. 491.

If the act of the Court below, in rendering this judgment which holds to be "prohibted" that which is sanctioned and even encouraged by the Federal Food, Drug and Cosmetic Act, is not in conflict with the act and thereby unconstitutional in itself, then the said act as so interpreted by the Court is unconstitutional as an invalid delegation of legislative power to the judiciary. As so interpreted, §342(a)(1) permits the judiciary, through court and jury, to establish fixed "tolerances" for pesticides, in spite of the clear intent of Congress that regulation of pesticides by such absolute standards, as distinguished from relative tests, is to be achieved through scientific means by administrative processes of the Department of Health, Education and Welfare. The nature of this type of regulation is one which

requires more scientific processes than those available in jury trials. Further, the act as so construed does not afford reasonable guides to be followed by the judiciary and permits it to confiscate property with unlimited discretion.

Finally, §342(a) (1) as so construed by the Court below violates the due process clause of the federal constitution because it unreasonably and arbitrarily discriminates against manufacturers and users of Benzene Hexachloride in particular, and pesticides in general, by prohibiting their use without any classification or distinction upon bases of degrees having any rational basis. The effect of such construction is that the jury has been allowed to find a "fact" which is contrary to laws of nature, to public policy and to the federal law, and to all concepts of what is "substantial evidence" under the federal law.

All of the state statutes and city ordinances cited in the Court of Civil Appeals' opinion contain the same essential provision which that Court found to have been violated in the §342(a)(1) of the federal statutes, to-wit: a food is demed "adulterated" if it contains any added poisonous or deleterious substance which may render such food injurious to health. The issue raised by these laws is the same as under the federal statute, and these local laws were invalid for the same reasons, as so construed by the Texas Court:

IV. Special and Important Reasons Suggest Allowance of This Writ

The Texas Court determined two questions of substance in its opinion below, and neither had been theretofore determined by the Court. First, Section 346 of the federal act had never been applied; this is apparent from a glance

at the annotations in U.S.C.A. But this section is now available to any zealous federal officer.

If this decision does not, by itself, increase the zeal of most officers, many of them may be expected to become increasingly zealous by virtue of the public debates now taking place in Congressional hearings and in literature such as the best-selling book "The Silent Spring." The mere popularity of such a book proves a growing public sympathy with strict regulation of the pesticide industry, and over-zealousness on the part of some regulatory officials may be expected if this trend continues.

Section 342(a)(1) of the federal act has been given application in accordance with the whim of a jury, and certainly not with regard for the over-all regulatory practices of the federal government. Probably this Court would not have applied it in this way, but we may expect that it will be so enforced by other state courts and juries because of the increasing public anxiety over chemicals.

Therefore Petitioner respectfully requests that a writ of certiorari issue to the Court of Civil Appeals for the First Supreme Judicial District of Texas.

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APPENDIX "A"

ORKIN EXTERMINATING COMPANY, INC.,
Appellee,

v.

GULF COAST RICE MILLS, *Appellee.*

NO. 13998

Appeal from District Court of Harris County

This suit was brought by plaintiff, Gulf Coast Rice Mills, against Orkin Exterminating Company to recover damages allegedly growing out of breach of contract and negligence of the defendant. Both plaintiff and defendant have perfected appeals to this Court from the judgment rendered by the trial court on the second trial of the case. From the judgment of the District Court rendered on the first trial an appeal was taken by the defendant and the judgment was reversed and the cause remanded by the Waco Court of Civil Appeals. Orkin Exterminating Company, Inc. v. Gulf Coast Rice Mills, 343 S.W. 2d 768, dism. w.o.j.

A summary of plaintiff's pleadings, which were identical on both trials, is given in the opinion of the Waco Court. We quote from such summary as follows:

> "Plaintiff alleged that it entered into a written contract with Orkin in 1952 under the terms of which Orkin was to exterminate and control insects, rodents, and pests in plaintiff's mill; that in August, 1955,

> Orkin sprayed plaintiff's mill with an insecticide or pesticide known as Lindane; that Lindane is poisonous and prohibited by law to be so used; that the application of Lindane to the mill rendered the rice unusable; that the use of Lindane on the interior of the mill was negligence; caused the rice to be unfit for use and adulterated; caused the Federal authorities to prohibit sale of the rice; caused the rice to be injurious to health and unsafe within the meaning of the Federal Food and Drug Act. 21 U.S.C.A. §301 et seq.; that the foregoing were proximate causes of damages suffered by plaintiff which were alleged to be some $96,000 (expense for remilling the rice and loss of profits incurred while so remilling the rice.)"

The plaintiff also alleged violations of certain provisions of the laws of the State of Texas and ordinances of the City of Houston, and pled that Orkin had defaulted and breached its contract in some 17 particulars. These breaches are summarized in the opinion of the Waco Court of Civil Appeals. That Court on the record before it held that the trial court erred in granting the partially instructed verdict for the plaintiff, thereby withdrawing from the jury any issues as to whether defendant breached its contract, or defaulted upon its express or implied warranty, since there were numerous disputed fact issues in the contract and breach of warranty phases of the contract. With respect to the tort phase of the case, the Court held that the record did not support any recovery.

On the second trial, the court overruled plaintiff's and defendant's motions for an instructed verdict, and submitted the case on seven special issues to which the jury found in substance: (1) that the application of Lindane in August, 1955, to the rice and premises of plaintiff was

a proximate cause of damages sustained by plaintiff; (2) that such application to the rice may have rendered it injurious to health; (3) that such application was a proximate cause of plaintiff's damages, and (4) was negligence; (5) that such negligence was a proximate cause of plaintiff's damages; (6) that $27,790.07 was the sum of money that would fairly and reasonably compensate plaintiff for such damages as were caused by application of Lindane to the rice and premises of plaintiff, taking into account (a) cost of remilling the rice, (b) cost of cleaning plaintiff's premises and (c) difference between reasonable market value of rice before and after remilling, directly resulting from the application of Lindane in August, 1955; and (7) that $15,000.00 would fairly and reasonably compensate plaintiff for such damages as were directly and proximately caused by loss of use of plaintiff's mill reasonably and necessarily consumed in remilling the milled rice.

The trial court on hearing defendant's motion for judgment non obstante veredicto, reduced the jury's finding of $27,790.07 in answer to Special Issue (6) to $21,245.32 because plaintiff's pleading limited such items of damages to that amount, and otherwise overruled such motion and entered judgment for plaintiff in the total sum of $36,246.32, being the reduced amount of the verdict plus $1.00 nominal damages for breach of contract insurance provisions.

Orkin contends that the trial court erred in overruling its motion for an instructed verdict and judgment non obstante veredicto when there was no evidence to support any cause of action or legal theory of recovery, and the

law of the case and the evidence showed that the record did not support recovery on the tort phase of the case: Orkin states that the statement of the nature of the case on pages 768-772 of the opinion of the Waco Court is correct and it adopts the same. It asserts that the pleadings and evidence were the same in both trials, except for defendant's additional allegation as to the law of the case made in its third amended original answer filed subsequent to the opinion handed down by the Waco Court. The Waco Court's summary of the evidence adduced on the first trial is as follows:

> "The record reflects that plaintiff Rice Mills entered into a written contract with defendant Orkin Exterminating Company in 1952, under which Orkin was to exterminate insects and rodents in plaintiff's mill; that the insect and rodent situation became so bad that in August, 1955 Orkin sprayed with an insecticide known as Lindane. Thereafter, the Federal Food and Drug Administration and the State Health Department and the City of Houston made some investigation of the use of Lindane at the Rice Mill. All agencies finally in effect delegated to Inspector Moses of the Federal Food and Drug Administration the right to act for them. Inspector Moses told the Rice Mill that the use of Lindane had violated the law; that the Mill was in serious trouble; that the Mill could ship no rice; that such rice was unfit for human consumption; that the rice would be condemned; the buildings padlocked and the Mill and its offices subject to prosecution both civilly and criminally. Inspector Moses' (and the government's) position was that no amount of Lindane was permitted on rice; that no tolerance was established for it, and for that reason the rice was contaminated, and would have to be remilled. The plaintiff Rice Mill relied

on what Inspector Moses told it (speaking for the Federal, State and City Health Departments), and without contesting, disputing, or litigating, the validity or legality of the claims of Inspector Moses and or the 3 Health Departments, plaintiff proceeded to remill the rice at an expense of some $46,245. and during such period lost profits which the jury found to be $40,000.

"As further pertinent, we note that the record reflects that some 95% of the plaintiff's rice was intended for export to a foreign country. The record further reflects that a great many samplings of the rice were tested for Lindane and that the result of such samplings ran from *none* up to 3.6 parts of Lindane per million parts of rice. It is further reflected that such amounts are not injurious to health, in any manner."

It is Orkin's contention that the facts in evidence pertaining to the negligence phase of the case are substantially the same as on the first trial, and that for such reason the specific findings of law made by the Waco Court are binding upon this Court as the law of the case. We think it unnecessary to set out such findings since they may be found on pages 771-2 of the Court's opinion. It is our view that there are some substantial differences between the evidence adduced at the first trial and at the second trial. Several medical witnesses testified on the first trial who did not testify on the second trial. The applicable ordinances of the City of Houston were not introduced on the first trial but were introduced on the second trial. On the second trial, there is no evidence that the City and State agencies delegated to Inspector Moses the right to act for them, although they may have agreed that

Federal, State and City food laws had been violated. Other differences will appear in the course of this opinion.

Plaintiff asserts that the answers of the jury to the special issues submitted constitute findings against Orkin on both the contract and tort phases of the case. Plaintiff requested certain more specific issues with respect to breaches of contract by Orkin, which were refused by the trial court. Any error of the trial court in refusing such issues has not been preserved by plaintiff and cannot be considered by this Court. The special issues submitted are limited to the use and application of Lindane and do not encompass any damages resulting from infestation of the rice by insects or rodents.

The contract does not make specific mention of Lindane. It specifies the scope of work and controlled service to be rendered by Orkin, and with respect to material to be used provides: "The materials used shall conform to Federal, State and local ordinances and laws, and shall be acceptable to the rice milling industry." Plaintiff argues that Orkin in using Lindane violated the provisions of the contract and breached its implied warranty to use proper materials, and was guilty of violations of the Federal Food, Drug & Cosmetic Act, in that (1) it violated 21 U.S.C., Sec. 342(a)(2) since no amount of Lindane whatever was permitted on milled rice; and (2) it violated 21 U.S.C., Sec. 342(a)(1) in that it contained a poisonous and deleterious substance "which may render" the rice injurious to health. Plaintiff further contends that the undisputed evidence also shows violations of the Pure Food laws of the State of Texas and violations of the City of Houston ordinances.

Our inquiry is limited to alleged violations of the contract in the use and application of Lindane and to determining whether there is any evidence supporting the findings of the jury with respect thereto on either or both the contract and tort phases of the case. We are unable to say as a matter of law that Orkin breached its contract and implied warranty with respect to the infestation of the rice. In this respect we are in accord with the law of the case as determined by the Waco Court. But even if we were to hold that there were such breaches as a matter of law, we would still be unable to determine how much damage resulted therefrom in the absence of a jury finding, and no issues were submitted with respect to such damage, although there was some evidence that the rice would probably have been remilled because of the infestation regardless of the use of Lindane.

Plaintiff pleaded that the spraying of an insecticide or pesticide on plaintiff's rice, rendering it unfit for sale, was a violation of Sections 861-880 of the Houston City Ordinances of 1942. Section 868 of such Ordinances provides that for the purpose of Article IV, entitled "Pure Food & Drugs," an article shall be deemed adulterated (c) Food . . . (5) "If it contains any added poisons or other added deleterious ingredient which may render such article injurious to health . . ." Section 866 provides: "No person shall, within the City, manufacture for sale, have in his possession with intent to sell or exchange, any article of food or drugs which is adulterated or misbranded within the meaning of this article." Section 873 provides for prosecution and punishment for violations of the foregoing sections.

The record in this case reflects that Lindane is a poisonous or deleterious ingredient and that it was added to the rice by Orkin in blowing Lindane dust all over the rice in plaintiff's mill. It was not necessary to show that the food containing an added poisonous or deleterious substance must affect the public health in order for it to be condemned. All that need be established is that the added poisonous or deleterious substance must be such as may render such article injurious to health. United States v. Lexington Mill & Elevator Co., 232 U.S. 399, 34 S. Ct. 337, 58 L. Ed. 658. There is substantial evidence showing that Lindane in any quantity on rice may render such article injurious to health. The jury's finding to Special Issue No. 2 finds support in the evidence. There is no assignment that any of the jury's findings are against the weight and preponderance of the evidence, and if there were such assignment, we could not consider it since defendant appeals from the court's refusal to grant an instructed verdict and judgment non obstante veredicto.

Plaintiff also pleaded that by spraying such rice and adulterating it and rendering it unfit for sale, Orkin violated Articles 4471 and 4472 of the Texas Revised Civil Statutes, and Articles 706, 707, and 717 of the Texas Penal Code. These provisions are substantially the same as those provided in the City of Houston ordinances. The violation of such statutes would subject plaintiff to criminal prosecution by the State, and to confiscation of the rice.

There is evidence in the record before us that Orkin applied Lindane to plaintiff's stores of rice, including both milled and unmilled rice. No claim for damages has been

made by plaintiff for the unmilled rice, since it would necessarily have to be milled and milling would remove the Lindane.

The Waco Court on the record before it found in effect that there had been no violation of the Federal statutes relied upon by plaintiff. We think the record on this appeal shows certain violations. Sec. 342 provides: "A food shall be deemed to be adulterated—(a) (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health. . .; or (2) (A) if it bears or contains any added poisonous or added deleterious substance . . . which is unsafe within the meaning of section 346a . . ." The exceptions in Section 342 (2) (A) do not apply to milled rice and are inapplicable to the facts of this case. Section 346 with respect to tolerances for poisonous ingredients provides: "Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for the purposes of the application of clause (2) (A) of section 342 (a) of this title.". The evidence and the record before us show that Lindane was not required in the production of rice and that its use could have been avoided. Indeed, Lindane had been used only once in connection with plaintiff's mill from 1940 to 1955, and then it was used without the knowledge of the plaintiff or the health authorities. From the time of the application in August, 1955 Lindane has not been used down to the date of the second trial in 1961. Moreover, no allowance or tolerance was established for the use of Lindane on milled rice.

Plaintiff asserts that on the second trial the evidence shows that Lindane was on all the samples of rice that were taken and analyzed, except one sample that had been remilled. Even if plaintiff is mistaken in such assertion there is nevertheless evidence showing that a number of samples were taken and that the results of many samplings showed from 0.2 to 3.6 parts per million of Lindane, and that the addition of such parts of Lindane to milled rice may render it injurious to health. Manifestly it would be impossible to segregate from the stores of contaminated milled rice in question some unknown quantity of rice that might not have had Lindane on it in such quantities. Since no tolerance for Lindane on milled rice as applicable to the facts of this case had been established by the Secretary of Health, Education & Welfare, the addition of any amount of Lindane to such milled rice was in violation of Section 342(a)(2) of the Federal Food, Drug & Cosmetic Act; and especially so if it may have rendered the rice injurious to health. The Act in question is quite specific, as stated by the Supreme Court of the United States in the recent case of Flemming v. Florida Citrus Exchange, 358 U.S. 153, 79 S. Ct. 160:

> "Here again, in our construction of this explicit Act, we must be sensitive to what Congress had written, and recall that 'It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort.' 62 Cases of Jam v. United States, 340 U.S. 593, 596, 71 S. Ct. 515, 518, 95 L. Ed. 566."

Section 3.41, Title 21, 1955, Code of Federal Regulations, provides: "(a) The amendment in clause (2) of section 402 (a) of the Federal Food, Drug, and Cosmetic

Act shall become effective on the dates specified for the following pesticide chemicals: . . . (2) Effective date October 31, 1955: . . . Lindane: . . . Gram (from treating storage bins)." On the second trial it was established that plaintiff had never had any treating storage bins. The 1954 amendment to Section 342(a)(2) as provided in Section 5 of the Act of July 22, 1954 as applicable to the facts of the case before us, became effective one year following the date of the enactment of the Act or on July 22, 1955, and was in full force and effect in August, 1955, when the Lindane was applied to plaintiff's rice. Section 120.1 (e); Title 21, 1955, Code of Federal Regulations, entitled "Definitions, Interpretations, and Exemptions," provides in substance that the term "Raw agricultural commodities" does not include foods that have been processed, fabricated, or manufactured by cooking, freezing, dehydrating, *or milling*. Since plaintiff's grain had been milled and was not a raw agricultural commodity, no tolerance had been established for it. Therefore, the application of any amount of Lindane was prohibited since it would add to the milled rice a poisonous or deleterious substance that may be injurious to health as shown by the evidence adduced on the second trial.

At the time of the occurrence in question, the Federal Food, Drug, and Cosmetic Act, Section 381(d), 21 U.S.C.A., provided with respect to exports that a food intended for export shall not be deemed to be adulterated or misbranded if it accords to the specifications of the foreign purchaser, is not in conflict with the laws of the country to which it is intended for export, and is labeled on the outside of the shipping package to show that it

is intended for export. "But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this chapter." While there is some evidence that as much as 95% of plaintiff's rice had been exported during some prior years, the evidence does not show that the rice in question was labeled for export or that it would necessarily be exported. It was held subject to sale in domestic markets as well as foreign markets. Furthermore, the undisputed testimony of plaintiff's general manager Smith, who negotiated contracts with foreign buyers, was to the effect that he could not have sold to any foreign purchasers any rice containing Lindane.

Defendant contends, however, that plaintiff voluntarily remilled its rice, and that it was not forced to do so by the Federal, State or City authorities. We think this contention is without merit. Under the evidence adduced on the second trial, it appears that plaintiff was placed in such position by Orkin that it could not keep the rice in its possession, sell or exchange the same without being subject to criminal prosecution and punishment under Section 873 of the Ordinance of the City of Houston, and under Article 717, Texas Penal Code. Additionally, the rice could be condemned, confiscated, forfeited and destroyed under Article 4470, Texas Revised Civil Statutes. The evidence shows that the State agency was prepared to take action if plaintiff's rice was sold or offered for sale with Lindane on it. Also, the shipment of such rice in interstate commerce would have subjected plaintiff to penalties under Sections 333 and 334 of the Federal Act. Having placed the plaintiff in the situation where it could neither retain

not sell the rice in question without violating the Pure Food laws of the City, State and Federal governments, and subjecting itself to prosecution and penalties, the defendant is not in a position to urge that plaintiff acted voluntarily and not under coercion in remilling the rice and thereby preventing such prosecution and penalties, and at the same time mitigating the damages which might have resulted from confiscation and destruction of the rice by the State or other governmental authority.

The cases cited by defendant with respect to voluntary payments are inapplicable to the factual situation in the present case. The retention or sale or offer to sell the rice in question constituted a violation of law, making plaintiff's action necessary to avoid prosecution, penalties and seizure of the rice. Under these circumstances plaintiff's act in remilling the rice was not voluntary but coerced as a matter of law. Where one risks prosecution, penalties and forfeiture of his property for noncompliance with law, his act in complying cannot be said to be voluntary. National Biscuit Co. v. State, 134 Tex. 293, 135 S.W. 2d 687; Crow v. City of Corpus Christi, Tex. Sup. 1948, 209 S.W. 2d 922; District of Columbia v. American Security & Trust Co., D.C. Cir. Ct. App. 1953; 202 F. 2d 21; St. John's Electric Co. v. City of St. Augustine, Fla. S. Ct. 88 So. 387; 17-A Amer. Jur., Duress and Undue Influence, Secs. 7, 14, p. 75; 21 Tex. Jur. 2d, p. 116, Duress & Coercion, §2.

Plaintiff on its appeal complains that the trial court erred in excluding certain evidence relative to lost profits and in denying its motion for lost profits before judgment. We have been unable to find in the record any request by plain-

tiff for submission of any issue on lost profits as such. The answer of the jury to Special Issue No. 7 awarding damages in the sum of $15,000.00 for the loss of use of plaintiff's mill consumed in remilling the milled rice, necessarily includes lost profits. No judgment for lost profits in any other amount could have been entered without plaintiff's compliance with rule 301, Texas Rules of Civil Procedure. There was no such compliance.

Plaintiff has cited a number of cases in support of the rule that where a business is already established and making a profit, it is permissible to show the amount of business done in corresponding periods of time not too remote, and the rule that uncertainty of proof as to the amount of lost profits will not defeat recovery so long as there is no uncertainty as to the fact of legal damages. These general rules are not questioned by defendant. In the instant case plaintiff's witness was asked to give oral testimony from some records as to the amount of rice purchased by plaintiff in October, November and December of 1953, to which question defendant objected because there had been no showing of any comparison between conditions during such period of time and the period of time in issue in this law suit. The objection was sustained. Plaintiff's witness was also asked whether he had an opinion as to the amount of rice he would have bought, to which question the defendant objected as not being based upon facts. No other evidence along such line was offered, although in its bill of exception in the jury's absence such witness testified that he thought "it would be reasonable to suppose" that they would have bought at least 100,000 additional barrels and that he thought "it is reasonable to suppose we would have made at least 50 cents a barrel". We cannot say that the court improperly excluded such testimony, but if there was any

error in such connection, we think the exclusion was not harmful in view of all the records and testimony relative to earnings and profits of the business that were admitted in evidence.

In its sixth Point, plaintiff asserts that the court erred in denying interest before judgment upon its damages. Plaintiff sued not only for its damages but for interest thereon as damages. It states in its brief that it continued to sustain damages until June 7, 1956. It is our view that the plaintiff is entitled as a matter of law to 6% interest as damages on the $36,246.32 from that date until date of judgment, such interest amounting to $12,239.17. The Texas Co. v. The State of Texas, 154 Tex. 494, 281 S.W. 2d 83; Watkin v. Junker, 90 Tex. 584, 40 S.W. 11; Tortuguero Logging Operation, Ltd. v. Houston, 349 S.W. 2d 315; Ewing v. Wm. L. Foley, Inc., 115 Tex. 222, 280 S.W. 499, 44 A.L.R. 627.

We think there is no merit in plaintiff's contention that it was entitled to a directed verdict or its contention that the court erred in granting a partial summary judgment for defendant in connection with plaintiff's claim for gross negligence and exemplary damages. A careful review of the record shows that there is no evidence that would warrant submission of an issue in connection with alleged gross negligence on the part of the defendant.

The judgment of the Trial Court is reformed by adding thereto interest to date of judgment in the sum of $12,239.17, and, as reformed is affirmed.

/s/ Ewing Werlein,
Associate Justice.

Judgment rendered and opinion filed November 8, 1962

APPENDIX "B"

REVERSED AND REMANDED
9 FEBRUARY, 1961.

NO. 3798

IN THE

Court of Civil Appeals

FOR THE
TENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT WACO

ORKIN EXTERMINATING COMPANY, INC., Appellant
vs.
GULF COAST RICE MILLS, Appellee

Appeal from District Court
Harris County

OPINION

Gulf Rice Mills filed this suit against Orkin Exterminating Company. Plaintiff alleged that it entered into a written contract with Orkin in 1952 under the terms of which Orkin was to exterminate and control insects, rodents, and pests in plaintiff's mill; that in August, 1955, Orkin sprayed plaintiff's mill with an insecticide or pesticide known as Lindane; that Lindane is poisonous and prohibited by law to be so used; that the application of Lin-

dane to the mill rendered the rice unusable; that the use of Lindane on the interior of the mill was negligence; caused the rice to be unfit for use and adulterated; caused the Federal authorities to prohibit sale of the rice; caused the rice to be injurious to health and unsafe within the meaning of the Federal Food and Drug Act, 21 U.S.C., Sec. 301, et seq.; that the foregoing were proximate causes of damages suffered by plaintiff which were alleged to be some $96,000 (expense for remilling the rice and loss of profits incurred while so remilling the rice).

Plaintiff further alleged that Orkin defaulted and breached its contract in some 17 particulars, summarized: 1) in not controlling insects and mice; 2) in not exterminating in a manner to minimize the possibility of U. S. Food and Drug Administration citing plaintiff; 3) that it did not conduct inspections as agreed; 4) that it did not fumigate as needed; 5) that it used Lindane which did not conform to Federal, State and local laws and ordinances; 6) that it used Lindane which was not acceptable to the rice milling industry because it would contaminate the rice and the mill and subject the mill to civil and criminal proceedings; 7) that it failed to furnish a certificate of insurance showing public liability in amount of $250/500,000; and property damage insurance in amount of $100/100,000.

By reason of the foregoing breaches of contract, plaintiff alleged its damages at $96,000.

Plaintiff further alleged that Orkin defaulted on the express warranty and implied warranty of its contract in failing to provide effective insect and rodent control in a safe manner, acceptable to the rice industry; for breach of which plaintiff alleged its damages at $96,000.

Plaintiff prayed for interest from January, 1946; as well as $200,000. exemplary damages for employing Lindane, which plaintiff alleged Orkin knew was a harmful poison, use of which was prohibited by Federal, State, and local laws.

Defendant Orkin answered by general denial; contributory negligence; unavoidable accident; alleged that the injuries were caused solely by government agencies operating independently of defendant; alleged that plaintiff's damages resulted from plaintiff's voluntary shutting its mill down and remilling the rice, without legal liability to do so; that the government inspector of the Food and Drug Administrator requested plaintiff to remill its rice, threatening suit if it did not do so, alleging violation of the law in use of Lindane; and that plaintiff voluntarily compromised and settled the government's threatened suit, without being legally bound to do so, and without seeking a judicial determination of the government's claims.

Trial was to a jury.

Defendant filed motion for instructed verdict contending, among other things, that no negligence was shown on defendant's part; that there was no evidence to justify a finding of facts supporting any legal theory of recovery against defendants; and that plaintiff voluntarily remilled its rice without seeking a judicial determination of its liability to do so. This motion was overruled by the Trial Court.

Plaintiff made motion for instructed verdict, contending, among other things: 1) that defendant breached its contract with plaintiff in a number of particulars, and that the undisputed evidence establishes defendant's liability

for plaintiff's damages which arose out of these breaches; 2) that the undisputed evidence shows defendant breached its express and implied warranty in its written contract in failing to provide effective insect and rodent control in a safe manner; 3) and in failing to carry out the provisions of its written contract, in using Lindane, which was prohibited by law to be so used.

The Trial Court entered an order granting in part and denying in part plaintiff's motion for instructed verdict. In such order the Court ordered the submission to the jury of issues inquiring whether Orkin's actions regarding the use of Lindane constituted negligence; whether such negligence was a proximate cause of the damages of plaintiff; and what damages, if any, plaintiff suffered from loss of profits. The Court found that plaintiff's damages for remilling the rice were $46,245.32. (The court further ordered issues concerning the plaintiff's right to recover interest as damages and punitive damages).

The Trial Court then entered an order in Limine, in which the court ordered defendant Orkin not to make argument to the jury "upon the following matters which have been found and concluded as matters of law by the court"; 1) counsel may not argue, comment or remark in any way so as to question the legality, validity or propriety of any acts or omissions of Walter R. Moses or the Federal Food and Drug Administration. 2) Counsel may not argue, comment or remark in any way concerning the necessity of the remilling of the rice by the plaintiff. 3) Counsel may not argue, comment, or remark in any way upon what the law is, or whether any violation of law occured on the part of any person. 4) Counsel may not argue,

comment, or remark on any issues contained in the breach of contract case herein.

Defendant requested the submission of a number of issues, among which were: 1) issues inquiring if plaintiff acted as a volunteer without legal obligation to do so, in incurring the expense in remilling the rice; 2) and whether or not the actions of Inspector Moses in requiring the remilling of the rice was the sole proximate cause of plaintiff's injury.

The Trial Court refused all issues requested by defendant and submitted issues to the jury which, in answer thereto, found:

1) Application of Lindane by Orkin to plaintiff's rice mill in August, 1955, was negligence.
2) Such was a proximate cause of plaintiff's damages.
3) Gulf Rice Mill lost profits as a result thereof in the amount of $40,000.
4) Orkin's application of Lindane to the rice mill was gross negligence.
5) For which $10,000. exemplary damages should be granted.
6) and 7) Gulf Rice Mills should recover interest from June 7, 1956.

Defendant moved for judgment non obstante veredicto and alleged, among other things: 1) the findings of the jury cannot afford a valid basis for judgment for the plaintiff; 2) the undisputed evidence and the law conclusively show that no legal liability did exist as asserted by the Federal Agency; further that plaintiff incurred its damages by voluntarily compromising the litigation threatened by

the Federal Agency, when no legal validity existed as to such threats; and plead for disregard of the findings on exemplary damages.

The Trial Court overruled such motion, except as to the findings on gross negligence and exemplary damages.

The Trial Court then entered judgment:

> "and the Court having found breaches of their contract by the defendant, which breaches were proximate causes of the damages sustained by plaintiff; and the Court having found that defendant defaulted upon its express warranty proximately causing plaintiff's damages; and the Court further finding that * * * its implied warranty was breached, proximately causing damages to the plaintiff; and the Court further finding and being of the opinion that notwithstanding the aforesaid breaches of contract and warranty, the actual damages of $86,245.32 were proximately caused by negligent acts of the defendant as shown by the jury's answers to the special issues."
>
> "It is therefore ordered * * * that (plaintiff) recover from the defendant * * * $105,219.29, being composed of actual damages in the amount of $86,245.32 plus interest from 7 June, 1956 at 6% in the sum of $18,973.97 * * *."

Defendant's motion for new trial was overruled by the Trial Court.

Defendant appeals on 42 points, including among which are: 1) the evidence is insufficient to justify any finding of facts supporting any legal theory of recovery; 2) the Trial Court erred in granting the partially instructed verdict for plaintiff, thereby withdrawing from the jury any issue as to whether defendant breached its contract, and/or defaulted upon its express or implied warranty.

The record reflects that plaintiff Rice Mills entered into a written contract with defendant Orkin Exterminating Company in 1952, under which Orkin was to exterminate insects and rodents in plaintiff's mill that the insect and rodent situation became so bad that in August, 1955 Orkin sprayed with an insecticide known as Lindane. Thereafter, the Federal Food and Drug Administration and the State Health Department and the City of Houston made some investigation of the use of Lindane at the Rice Mill. All agencies finally in effect delegated to Inspector Moses of the Federal Food and Drug Administration the right to act for them. Inspector Moses told the Rice Mill that the use of Lindane had violated the law; that the Mill was in serious trouble; that the Mill could ship no rice; that such rice was unfit for human consumption; that the rice would be condemned; the buildings padlocked and the Mill and its offices subject to prosecution both civilly and criminally. Inspector Moses' (and the government's) position was that no amount of Lindane was permitted on rice; that no tolerance was established for it, and for that reason the rice was contaminated, and would have to be remilled. The plaintiff Rice Mill relied on what Inspector Moses told it (speaking for the Federal, State and City Health Departments), and without contesting, disputing, or litigating, the validity or legality of the claims of Inspector Moses and/or the 3 Health Departments, plaintiff proceeded to remill the rice at an expense of some $46,245, and during such period lost profits which the jury found to be $40,000.

As further pertinent, we note that the record reflects that some 95% of the plaintiff's rice was intended for export to a foreign country. The record further reflects

that a great many samplings of the rice were tested for Lindane and that the results of such sampling ran from *none* up to 3.6 parts of Lindane per million parts of rice. It is further reflected that such amounts are not injurious to health, in any manner.

The Trial Court granted instructed verdict for plaintiff on the contract and breach of express and implied warranty phases of this case. Our examination of the record leads us to the conclusion that there were numerous disputed factual issues in the contract and breach of warranty phases of the case, and that the Trial Court erred in granting an instructed verdict, in these respects.

This brings us to a consideration of the tort phase of the case. The Trial Court's submission of issues to the jury is predicated upon the Trial Court's finding that the law had been violated when Lindane was sprayed by Orkin in plaintiff's rice mill. The fact that Inspector Moses certified that the law was violated did not foreclose such matter. (While plaintiff contended that the Federal, State and City of Houston laws had been violated both as to contamination by Lindane and contamination by filth etc., the case was actually developed and tried on the theory that the use of the Lindane violated the Federal law; and as noted, the State and City of Houston Health Departments, left the matter for both of their agencies, up to Inspector Moses of the Federal Agency. In any event, the proof of violation of the State and local laws, both as to use of Lindane and filth, is inadequate. The City of Houston Ordinances were not introduced in evidence). This brings us to the question of whether the Federal law was in fact violated—as contended so earnestly by Inspector Moses on the trial, and by plaintiff's brief in the

instant appeal. The Federal Statutes principally involved are Sec. 342; 346(a); 321; 381 U.S.C.A. (See also 1954 U. S. Code, Congressional and Administrative News; and 1955 Code of Federal Regulations). Sec. (12) 3.41 Title 21, 1955 Code of Federal Regulations provides that such acts shall not become effective for Lindane on grain until *October 31, 1955*. (Application of the Lindane to the rice was in August, 1955). Moreover, (See Section 1 (321 Title 21 U.S.C.) 1954 U. S. Code Cong. & Adm. News, p. 2631), it appears that the statute does not attempt to regulate residue from pesticide chemicals which remain in or on *processed* commodities; and that food *processed* by operations such as *milling* are not subject thereto.

Finally, 95% of plaintiff's rice was intended for export, and under Section 381(3) is not deemed adulterated under the instant chapter U.S.C.

From the record before us, we cannot say that the use of Lindane; in the quantities used, and under the factual situation here involved, was violative of the Federal law.

Moreover, as noted, the record fails to reflect the presence of Lindane in the plaintiff's rice in any quantity injurious to health.

From what has been said, it is our view that plaintiff has not shown a violation of Federal, State, or local law, and that the record does not support recovery on the tort phase of the case. See also: Florida Citrus Exchange v. Folsom, 5th Circuit, 246 F. 2d 850; U. S. v. Lexington Mill & Elevator Co., 232 U.S. 399; Wood Mfg. Co. v. U. S., 286 Fed. 84.

Defendant's contentions set up in this opinion, supra, are sustained, and the cause is REVERSED and REMANDED.

FRANK G. McDONALD
Chief Justice

1) Code of Federal Regulations, Chap. 21, Sec. 120.1, Definitions & Interpretations (12) Section 3.41 "Pesticide Chemicals: extended dates on which statute shall become fully effective.

(a) * * * shall become effective on the dates specified for the following pesticide chemicals * * *.

(2) Effective date October 31, 1955. * * * *Lindane* * * * *Grain* (from treating storage bins)"

2) 1954 U. S. Code Congressional & Adm. News, p. 2631 "This bill does not attempt to regulate the residue from pesticide chemicals which may remain on processed, fabricated, or manufactured food other than by limiting the permissible residues on raw agricultural commodities. Food processed by operations such as cooking, freezing, dehydration or *milling* would remain subject to Section 406 rather than being regulated by this bill." (Sec. 406 contains a general declaration that any poisonous or deleterious substance added to food is unsafe except where the substance "is required in the production thereof and cannot be avoided by good manufacturing practice." However, in any case where such a substance is so required or cannot be so avoided (and this is so in case of the use of pesticide chemicals in the production of most raw

agricultural commodities) Sec. 406 directs the Secretary of Health, Education, and Welfare to promulgate regulations limiting the quantity on the food to such extent as such secretary finds to be necessary for protection of public health." p. 2632, 1954 U. S. Code Cong. & Adm. News.

3) Title 21 U.S.C.A., Sec. 381(d). A food, drug, device or cosmetic intended for export shall not be deemed to be adulterated or misbranded under this chapter * * *. (U.S.C.A. 1961 pocket part, p. 357).

APPENDIX "C"

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND ORDINANCES

1. United States Constitution:

Fifth Amendment: "*** nor be deprived of life, liberty or property without due process of law***." U.S.C.A. Constitutional Amendments 6-14.

Fourteenth Amendment: "No state shall *** enforce any law which shall abridge the privileges or immunity of citizens of the United States." U.S.C.A. Constitutional Amendments 1-13.

"Supremacy Clause" (Art. 6): "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. Federal Food, Drug and Cosmetic Act, Title 21, U.S.C.A.:

Section 342: "A food shall be deemed to be adulterated *** (a) if it bears or contains any poisonous or deleterious substance which may render it injurious to health; *** or (2)(A) if it bears or contains any added poisonous or added deleterious substance *** which is unsafe within the meaning of Section 346 of this title, or (B) if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of Section 346a(A) of this title ***."

Section 346: "Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good

manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2) (A) of section 342(a) of this title; but when such substance is so required or cannot be so avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2) (A) of section 342(a) of this title. While such a regulation is in effect limiting the quantity of any such substance in the case of any food, such food shall not, by reason of bearing or containing any added amount of such substance, be considered to be adulterated within the meaning of clause (1) of section 342(a) of this title. In determining the quantity of such added substance to be tolerated in or on different articles of food the Secretary shall take into account the extent to which the use of such substance is required or cannot be avoided in the production of each such article, and the other ways in which the consumer may be affected by the same or other poisonous or deleterious substances."

Section 346a: (a) Any poisonous or deleterious pesticide chemical, or any pesticide chemical which is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety of pesticide chemicals, as safe for use, added to a raw agricultural commodity, shall be deemed unsafe for the purposes of the application of clause (2) of section 342(a) of this title unless --

(1) a tolerance for such pesticide chemical in or on the raw agricultural commodity has been prescribed by the Secretary of Health, Education, and Welfare under this section and the quantity of such pesticide chemical in or

on the raw agricultural commodity is within the limits of the tolerance so prescribed; ***."

3. Code of Federal Regulations (1955) Title 21:

Section 3.41. "(a) The amendment in clause (2) of Section 402 (a) of the Federal Food, Drug and Cosmetic Act shall become effective on the dates specified for the following pesticide chemicals: *** (2) Effective date October 31, 1955: ***Lindane:... Grain (from treating storage bins)."

Section 120.101 "* * * (a) (1) This section designates the poisonous or deleterious substances that, for the purposes of section 406 of the Federal Food, Drug and Cosmetic Act, are found to be required in the production of the fresh fruits or vegetables named in paragraph (c) of this section. * * * (b) * * * (2) For the purposes of this section, where a tolerance of 5 parts per million for benzene hexachloride is set, it shall be deemed applicable to commercial benzene hexachloride, which is a mixture of several isomers. If the gamma isomer, known as lindane, is used exclusively of other isomers, the tolerance shall be 10 parts per million."

Section 120.1 "* * * (c) Raw agricultural commodities include, among other things, fresh fruits, whether or not they have been washed and colored or otherwise treated in their unpeeled natural form; vegetables in their raw or natural state, whether or not they have been stripped of their outer leaves, waxed, prepared into fresh green salads, etc.; grains, nuts, eggs, raw milk, meats, and similar agricultural produce. It does not include foods that have been processed, fabricated, or manufactured by cooking, freezing, dehydrating, or milling.

"(f) Where raw agricultural commodities bearing residues that have been exempted from the requirement of

tolerance, or which are within a tolerance permitted under section 408 are used, the processed food will not be considered unsafe within the meaning of section 406 if:

"(1) The poisonous or deleterious pesticide residues have been removed to the extent possible in good manufacturing practice; and,

"(2) The concentration of the pesticide in the preserved or processed food when ready to eat is not greater than the tolerance permitted on the raw agricultural commodity."

4. Penal Code of the State of Texas, Chapter 2, Title 12 (Vernon's Annotated Statutes, 2 Penal Code 37-38):

Article 707. "For the purposes of this chapter an article shall be deemed to be adulterated: * * * (c) In the case of food; * * * (5) if it contains an added poisonous or other added deleterious ingredient which may render such article injurious to health; * * *."

5. Civil Statutes of the State of Texas (12A; Vernon's Annotated Civil Statutes 325):

Article 4472. "The terms 'adulterated' and 'misbranded', as used in this chapter, shall be held to have the same meaning as is given those terms in chapter two of title 12 of the Penal Code."

6. Ordinances of City of Houston (City Code of Houston, Texas, 1942, page 454):

Section 868. "For the purposes of this article, an article shall be deemed adulterated: * * * (c) Food. * * * (5) If it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health; * * *."

APPENDIX "D"

NO. 488,534

IN THE

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
127TH JUDICIAL DISTRICT

GULF COAST RICE MILLS

v.

ORKIN EXTERMINATING COMPANY, INC.

JUDGMENT

On December 4, 1961, the above entitled and numbered cause came on to be heard. There appeared Gulf Coast Rice Mills, a partnership composed of R. L. Williams and J. M. Chumney, as plaintiff in person and by their attorneys of record; and came Orkin Exterminating Company, Inc., as defendant, in person and by its attorneys of record. All parties announced ready for trial. A jury of 12 good and lawful men and women having been duly impaneled and sworn and having heard the pleadings, the introduction of testimony began.

Having heard the evidence and the argument of counsel, the jury upon their oaths did, for their verdict, in response to the following special issue submitted to them by the Court on December 11, 1961, make the following respective findings:

The Court submits this case to you on special issues and your answers to these issues, which you will make on a separate sheet of paper, will be your verdict. You will answer such issues without reference to the effect your

answers may have upon the judgment to be rendered in this case. In your deliberations you must not discuss any fact or matter which is not based upon the evidence admitted before you under the rulings of the Court.

Let your verdict be signed by your Foreman, whom you will select from your number.

Your verdict must be by unanimous vote.

By the term "negligence", as used in this charge, is meant a failure to do that which a person of ordinary prudence in the exercise of ordinary care would do under the same or similar circumstances, or the doing of that which a person of ordinary prudence in the exercise of ordinary care would not do under the same or similar circumstances.

By the term "proximate cause," as used in this charge, is meant a cause which in a natural and continuous sequence, unbroken by any new and independent cause, produces an event, and without which the event would not have occurred, and to be a proximate cause of an event, it should have been reasonably anticipated and foreseen by a person of ordinary care and prudence in the exercise of ordinary care that the event or some similar event would occur as a natural and probable consequence. There may be more than one proximate cause.

By the term "new and independent cause", as that term is used in the foregoing definition of "proximate cause", is meant the act or omission of a separate and independent agency, which destroys the causal connection between the negligent act, if any, or omission, if any, and the injury complained of, and thereby becomes, in itself, the immediate cause of such injury.

By the term "preponderance of the evidence" is meant the greater weight and degree of credible evidence admitted for your consideration.

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the application of Lindane in August of 1955 to the rice and premises of Plaintiff was a proximate cause of the damages, if any, sustained by Plaintiff?

Answer: "We do" or "We do not".
Answer: *We do.*

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that the application of Lindane to the rice of Gulf Coast Rice Mills in August of 1955 may have rendered the rice injurious to health?

Answer: "We do" or "We do not".
Answer: *We do.*

In answering the above special issue, you are to use the word "may" in its ordinary meaning and to consider that the rice when prepared as a food may be consumed by the strong and the weak, the old and the young, the well and the sick and it is intended that if the rice because of any added poisionous ingredient may possibly injure the health of any of these, it shall come within the meaning of injurious to health. If the added poisonous ingredient cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such rice, though having a small addition of poisonous ingredient, may not be considered injurious to health.

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that such application which may have rendered the rice injurious to health, if you have so found, was a proximate cause of the damage sustained, if any, by the plaintiff?

Answer: "We do" or "We do not".

Answer: *We do.*

If you have answered Special Issue No. 2 "We do"; and only in that event, then answer:

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that such application which may have rendered the rice injurious to health, if you have so found, was negligence?

Answer: "We do" or "We do not".

Answer: *We do.*

If you have answered Special Issue No. 4 "We do", and only in that event, then answer.

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the damages, if any, sustained by plaintiff?

Answer: "We do" or "We do not".

Answer: *We do.*

SPECIAL ISSUE NO. 6

What sum of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff for such damages, if any, as were

directly and proximately caused by reason of the application of Lindane to the rice and premises of the plaintiff in August of 1955, taking into account such of the following elements which you find are established by a preponderance of the evidence, and none other:

(a) The cost to plaintiff of remilling rice, if any, directly resulting from the application of Lindane to the rice and premises of the plaintiff in August of 1955;

(b) The cost to plaintiff of cleaning plaintiff's premises, if any, directly resulting from the application of Lindane to the premises of the plaintiff in August 1955;

(c) The difference between the reasonable market value of the milled rice before remilling and the reasonable market value after remilling, directly resulting from the application of Lindane to the rice in August of 1955.

Answer by stating the amount, if any, in dollars and cents.

Answer: *$87,790.07.*

SPECIAL ISSUE NO. 7

What sum of money, if any, do you find from a preponderance of the evidence would reasonably and fairly compensate the plaintiff for such damages, if any, as were directly and proximately caused by the loss of the use of his mill reasonably and necessarily consumed in remilling the milled rice?

Answer by stating the amount, if any, in dollars and cents.

Answer: *$15,000.00.*

You are the sole and exclusive judges of the facts proved, the credibility of the witnesses, and the weight to be given their testimony. The law you are bound under your oaths to receive from the charge of the Court as herein given you and be governed thereby.

/s/ WILLIAM M. HOLLAND
Judge.

Such findings were received by the Court and were filed and entered of record on the minutes of the Court.

The Court being of the opinion that judgment should be entered for the plaintiff as follows:

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that Gulf Coast Rice Mills, a partnership composed of R. L. Williams and J. M. Chumney, plaintiff, do have and recover of and from the defendant, Orkin Exterminating Company, Inc., the sum of Thirty-Six Thousand Two Hundred Forty-Six and 32/100 Dollars ($36,246.32), being composed of the jury's verdict of $42,790.07 reduced by the Court non obstante veredicto to the amount of $36,245.32, plus $1.00 nominal damages for breach of contract insurance provisions; that the plaintiff have interest upon its judgment from date of this judgment at the legal rate of 6%, and recover its costs incurred herein, for all of which let execution issue.

Defendant duly excepted to the foregoing judgment in open Court, and gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District at Houston, Texas.

RENDERED, ENTERED and SIGNED at Houston, Texas on ____ day of January, 1962.

/s/ WILLIAM M. HOLLAND
Judge

APPROVED AS TO FORM ONLY:

CARNES & MARTIN

By BURKE M. MARTIN
Attorneys for Plaintiff

THE KEMPERS

By JOHN D. RICHARDSON
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No. 283

IN THE

Supreme Court of the United States

October Term, 1963

ORKIN EXTERMINATING COMPANY, INC.,
Petitioner

v.

GULF COAST RICE MILLS, *Respondent*

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the First Supreme Judicial District of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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August 10, 1963

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On Petition for a Writ of Certiorari to the Court of Civil Appeals for the First Supreme Judicial District of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Civil Appeals is reported at 362 S.W. 2d 159.

JURISDICTION

1. *The Petition is Filed Out of Time.*

The Supreme Court of the State of Texas refused an application for writ of error in the above entitled cause

on March 6, 1963. The petitioner's timely filed motion for rehearing was overruled by the Supreme Court of the State of Texas on April 10, 1963. The time for filing a petition expired 90 days thereafter, on July 9, 1963.

The petition was filed on July 17, 1963, more than 90 days since the final ruling by the highest court of the State of Texas, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court.

The 90-day time limit is jurisdictional, and this Honorable Court is without jurisdiction for this reason. 28 U.S.C., Section 2101(c).

2. *The Judgment is Supported on Non-Federal Grounds.*

The judgment is based upon adequate and independent non-federal grounds, being the State of Texas statutes and the ordinances of the City of Houston. Texas Penal Code (Vernon's) Articles 706, 707, 717. Texas Revised Civil Statutes (Vernon's) Articles 4466, 4470-4472. City of Houston Code (1942), Sections 861-880 (Plf. Ex. 26; S.F. 362-380).

Breaches of the state law and city ordinances were pleaded by the respondent as being violated and causing damages to the respondent. Proof of their violation was made and is in the record. The jury found facts showing their violation and damages resulting therefrom by its answers to Special Issues No. 2 through 7, inclusive. The trial court found that there was proof showing violation of the state law and violation of the city law by submitting issues upon whether the Lindane poison may have rendered the rice injurious to health, and by refusing petitioner's motion for judgment non obstante veredicto.

The Court of Civil Appeals found that the jury's finding, being Special Issue No. 2, has support in the evidence. The State of Texas Supreme Court has concurred with those findings and the breaches of state and city law by refusing to grant an application for writ of error.

In the opinion below at 362 S.W. 2d, the Court of Civil Appeals points out at pages 163, 164 the pleadings that the state law was violated and that the city law was violated. At page 164 the Court says, ". . . .there is nevertheless evidence showing that a number of samples were taken and that the results of many samplings showed from 0.2 to 3.6 parts per million of Lindane, and that the addition of such parts of Lindane to milled rice may render it injurious to health."

The finding that the Lindane application may render the rice injurious to health constitutes adulteration of the food under both the state law and the city ordinances.

At page 165, of the opinion, the Court of Civil Appeals, in explaining why the respondent was not a volunteer, holds the application of Lindane by the petitioner had adulterated the rice and rendered the respondent subject to criminal prosecution and punishment under both the state law and the city ordinances.

Even if the Federal act had not been pleaded and violations thereunder proven, the judgment below would have been the same under either the State of Texas pure food law alone, or under the City of Houston ordinances alone.

A state court judgment will not be reviewed when based upon adequate, independent, non-federal grounds. *Fox Film Corp. v. Muller*, 296 U.S. 207.

3. *A Fact Question Was the Only Question Preserved for Appeal.*

A fact question was the only question preserved by the petitioner for appeal.

Under procedure in the state court of Texas, a party may appeal from the overruling of his motion for judgment non obstante veredicto alone, without moving for a new trial. Rule 324, Texas Rules of Civil Procedure. However, where a party elects to appeal from the denial of motion for judgment non obstante veredicto, he is limited on appeal solely to the alleged error in overruling such motion and the points raised therein. Any other claim or complaint is waived. Rule 324, Texas Rules of Civil Procedure. *Freed v. Bozman*, 304 S.W. 2d 235, Syl. 7 at p. 241; *Trice Production Co. v. Dutton Drilling Co.*, 333 S.W. 2d 607, Syl. 11, 14 at pp. 616, 617.

The petitioner did not present in its motion for judgment non obstante veredicto any question or complaint of a constitutional nature, or of application of any law, federal, state or city. Petitioner's only complaint was that there was no evidence to support the judgment. That sole point which was preserved has been determined against the petitioner by the jury, the trial court, the Court of Civil Appeals and the Supreme Court of the State of Texas. There is such evidence in the record and it has been found sufficient. (S.F. 42-49, 51-52, 74-77, 245, 258, 295-297, 299-315) 362 S.W. 2d at 163-166

Jurisdiction is not exercised to review a decision of the jury and state courts upon a question of fact. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160. Seventh Amendment, United States Constitution.

4. *No Federal Question Was Claimed in the State Court.*

No federal question was raised in the state court proceedings, as required by 28 U.S.C., Section 1257 (3).

The petitioner did not plead or present any question on validity or unconstitutionality in the trial court, either before or after judgment. Further, it did not present such question in any form upon appeal to the Court of Civil Appeals.

It was not until after rendition of the judgment and opinion on appeal that the petitioner for the first time, by way of motion for rehearing, questioned validity or constitutionality.

Thus, validity was not "drawn in question", and no right, privilege or immunity was "specially set up or claimed", as required by Section 1257 (3) of 28 U.S.C. *Palmer Oil Corp. v. Amerada Corp.*, 343 U.S. 390.

5. *Under State Procedure, a Federal Question Was Not Raised.*

Rule 279 of Texas Rules of Civil Procedure provides in part as follows:

> "Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; . . ."

Petitioner first attempted to raise a question of validity or constitutionality by rehearing after decision on appeal. A complaint made for the first time by motion for rehearing in the Court of Civil Appeals will not be considered. *Quinn v. Wilkerson*, 195 S.W. 2d 399 at 404.

6. The State Supreme Court Did Not Rule on Late Federal Claim.

No federal claim or complaint was made until after rendition of the decision complained of, and the state court opinion is completely silent on any federal question. Under these circumstances, jurisdiction should be declined. *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309. It is presumed that the silence is due to the procedural deficiency. *Bailey v. Anderson*, 326 U.S. 203, 206-7.

7. There Was No Surprise on Law Application.

Petitioner recognizes that it did not attempt to raise any federal question until motion for rehearing after the judgment of the appellate court was entered. Yet petitioner seeks to obtain review by claiming surprise.

There was no surprise for the following, among other, reasons:

(a) The city, state, and federal health authorities notified the petitioner exterminating company in person immediately following this occurrence that *any* amount of the poison Lindane contaminated and adulterated the rice. (S.F. 63-64, 74-78)

(b) The respondent's pleadings on file for several years before trial specially alleged the city ordinances, state laws and federal laws that were violated. The manner and circumstances under which they were violated, were pleaded, including violation of federal law by the application of *any* amount of Lindane poison, and violation of city and state laws by addition of the Lindane poison to the rice so that it may be rendered injurious to health.

(c) Voluminous pre-trial depositions and discovery procedures were exhausted, so that petitioner was fully apprised of respondent's position, and how respondent charged laws were violated and petitioner was negligent.

(d) As pleaded and proven by the respondent, the trial court ruled that the application of any amount of Lindane poison to the milled rice violated the Federal Food, Drug & Cosmetic Act, 21 U.S.C., Section 342(a) (2). This ruling was known to petitioner during trial before submission of the charge to the jury and before entry of judgment. No complaint was made in the trial court or on appeal to the Court of Civil Appeals.

(e) Regarding application and constitutionality of the "may render injurious" provisions in the city, state, and federal law, the trial court submitted to the jury a special issue on this fact question (Special Issue No. 2), together with appropriate instructions thereon taken directly from *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, Petitioner made no complaint of validity, application or constitutionality in the trial court, either before or after judgment, nor on appeal to the Court of Civil Appeals.

(f) The judgment and opinion in the state court found that there was evidence supporting violation of city, state, and federal law, as plaintiff had been pleading and urging for four years before this trial. There was no surprise.

Federal questions were not claimed in the state courts until petition for rehearing in the appellate court, which is too late. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128.

QUESTION PRESENTED

After a trial by jury, the petitioner filed a motion for judgment non obstante veredicto, which was overruled. Under state law and procedure, a party complaining of the judgment may file a motion for new trial, make all complaints desired therein, and urge on appeal any or all of those complaints. If the party elects to appeal only from the denial of motion for judgment non obstante veredicto, then all other complaints are waived, and the party may question on appeal only the denial of motion for judgment non obstante veredicto and matters contained therein.

Since petitioner has followed this latter course, the only question preserved for appeal is:

1. Is there any evidence in the record to support the verdict and judgment which found negligence and breaches of city ordinances, state statutes and federal statutes?

STATUTES, ORDINANCES AND REGULATION INVOLVED

The city ordinances and state statutes involved are the following:

> City of Houston Code (1942 ed.), Sections 861-880; Texas Penal Code (Vernon's), Articles 706, 707, 717; and Texas Revised Civil Statutes (Vernon's), Articles 4466, 4470, 4471, 4472.

The pertinent federal statute is the Federal Food, Drug, & Cosmetic Act, 21 U.S.C., Sections 301 et seq., especially Section 342 (a) (1) and (2) as they appeared in 1955.

The pertinent federal regulation is 21 Code of Federal Regulations, Section 120.1(e).

STATEMENT

The rice mill and the exterminating company entered into a written contract whereby, for monthly payments, the exterminating company agreed to control insects and rodents, and to use only insecticides allowed by law and acceptable to the industry. (Plf. Ex. 1-A, Secs. A., B., C.; S.F. 12-16)

The respondent is a long-established rice mill business. A rice mill has been operated on its premises continuously since 1913, and partner R. L. Williams has operated the mill there since 1935. (S.F. 239-242) In the 1950's, the mill's average sales were about $4,000,000 per year. (S.F. 242)

Since there was great danger in the application of poisonous insecticides directly to the processed foodstuff, rice (Plf. Ex. 15; S.F. 249), the mill paid for and the exterminating company contracted to carry public liability insurance in the amount of $250,000/$500,000, contractor's liability insurance in the amount of $250,000/$500,000, and property damage insurance in the amount of $100,000/$100,000 (Plf. Ex. 1-A, Sec. H; S.F. 19-23).

In the latter part of 1955 the exterminating company permitted insects and rodents to become completely out of control. (S.F. 65-68, 134-140, 261-266).

In August, 1955, the exterminating company applied a prohibited poison, Lindane, to the entire stores of rice, the mill and the warehouse. There was approximately $1,000,000 worth of rice poisoned. The application of Lindane to the rice was at once a violation of city ordinances, state statutes, and the federal act. (S.F. 42-49, 51-52, 74-77, 245, 258, 291-295, 299).

Lindane is the common name for the gamma isomer of benzene hexachloride. It is highly poisonous and toxic. It is known to have caused death in humans. (S.F. 296-297, 306, 309-310).

To remove the Lindane poison the rice mill had to remill rice and thoroughly clean the premises. Over 3,000,000 pounds had to be remilled. The rice mill was out of the market for three months at the height of season. This was at great expense to the rice mill. (S.F. 57, 74-77, 120-132, 384-386, 393-394, 397-399).

This suit is for damages to milled rice only, which had to be remilled to remove the poison contamination. (S.F. 42-47, 76-77, 119, 232, 401-402).

The heavy application of the poison was discovered and a meeting was held by the representatives of the city health authorities, state health authorities, federal health authorities, the rice mill and the exterminating company. (S.F. 47-52, 63-64, 69-78). All food and drug agencies, city, state and federal, notified the rice mill and the exterminating company that the rice was adulterated by the Lindane poison, and that it could not be sold, offered for sale, or moved in commerce. (S.F. 47-52, 63-64, 69-78, 408-409). The rice mill was notified that it would be subjected to civil and criminal provisions of the law. (S.F. 276-282, 401-402, 408-409) 362 S.W. 2d 159 at 165.

The director of the State Division of Food and Drugs testified that the state agency was prepared to take action by filing suit, obtaining a restraining order and exercising the seizure provisions of the Texas law (S.F. 277-282).

All 50 states of the Union have and apply their own pure food and drug acts. See Vol. 3 CCH Food, Drug & Cosmetic Law Reporter.

The Texas pure food and drug act provides that food shall be deemed adulterated if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health. The Texas statutes also provide for seizure, destruction, civil and criminal penalties. Texas Penal Code (Vernon's), Articles 706, 707, 717. Texas Civil Statutes (Vernon's), Articles 4466, 4470-4472.

The City of Houston had in effect ordinances containing similar provisions for adulteration by added poisonous or deleterious ingredients which "may render such article injurious to health." The ordinances contained other provisions making violation an offense subject to fine and subjecting the food to seizure and destruction. (Plf. Ex. 26; City of Houston Code (1942), Sections 861-880.)

In addition to adulterating the rice and violating both the state statutes and city ordinances, the poison violated the federal act. This refers to the Federal Food, Drug, & Cosmetic Act, 21 U.S.C., Section 342 (a) (2), which prohibited *any* amount of Lindane on milled rice.

There is abundant evidence in the record that the Lindane poison adulterated the milled rice. This testimony was received from a medical doctor specializing in poisons, from a qualified biochemist, and from the Director of the State Division of Food and Drugs, as well as from others. (S.F. 295-297, 299, 304-305, 309-310, 315, 74-77).

The jury found as a fact that the application of the poison Lindane to the rice may have rendered it injurious to health. That there is evidence in support of that finding has been upheld by the trial court, the Court of Civil Appeals and the Supreme Court of the State of Texas.

The occurrence made the basis of this suit, the application of the poison Lindane to the milled rice, represents a single, isolated occurrence. To the knowledge of the rice mill, Lindane had never previously been applied or dusted upon its rice. This is the only instance where it was discovered by the health authorities. Since the occurrence in August, 1955, Lindane has not been used again. 362 S.W. 2d 159 at 164. The use of Lindane poison in production of rice is both unnecessary and undesirable. To permit the application of poisonous Lindane to processed rice would be detrimental to the public health. Prohibition of such use will not affect the public, the industry or even the parties here.

SUMMARY OF ARGUMENT

The judgment sought to be reviewed was correctly determined. The "may render injurious" provisions of city and state food laws, as well as the federal act, were applied and interpreted in accordance with the Supreme Court's decision in *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399.

The decision of this case has no significance to other litigants or to the public. The record shows that during 21 years of rice mill operation, both before and after the incident made the basis of this suit, the insecticide containing the poison Lindane was applied only one time. There is no significance in the case to the nation or public, and would not arise again between these parties or in the industry.

The Supreme Court decision in the *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, which was followed here, precludes any question. There is no conflict of decisions, but rather established law has been followed.

The only issue preserved by the petitioner for review was a fact question of whether there was any evidence supporting the jury finding. The jury determination of fact and the evidence supporting it has been confirmed by the state trial court and two state appellate courts.

ARGUMENT

1. *The Judgment Below Was Clearly Correct.*

The exterminating company by its written contract agreed to use only pesticides which conformed to state, city and federal law, and which were acceptable to the industry. (Plf. Ex. 1-A, Sections A., C. 1. S.F. 12, 13, 15). It also contracted to minimize the possibility of citation by the food and drug administration. (Plf. Ex. 1-A, Sections B. 1., 2).

The exterminating company made an extremely heavy application of insecticide containing the poison Lindane to the entire stores of rice, the mill and the warehouse. The poison was in a dust carrier, was applied by a power driven blower, and there was no part of the rice or mill which was not covered by Lindane. (S.F. 42-49, 51-52, 74-77, 245, 258, 291-295, 299).

The City of Houston Ordinances provide that a food is adulterated and unfit for sale if it contains any added poisonous or deleterious ingredient "which may render such article injurious to health." City of Houston Code (1942), Sections 861-880 (Plf. Ex. 26; S.F. 362-380).

The state food and drug laws contained similar "may render injurious" provisions, with attendant civil and criminal penalty provisions. Articles 4466, 4470, 4471, 4472, Texas Civil Statutes (Vernon's). Article 706, 707, 717, Texas Penal Code (Vernon's).

The federal act likewise has a "may render injurious" provision that food is adulterated if it contains any poisonous or deleterious substance which may render it injurious to health: 21 U.S.C., Section 342(a) (1). (Plf. Ex. 28).

The jury found that the application of Lindane to the rice may have rendered it injurious to health. (Special Issue No. 2, Transcript Vol. 1). There is abundant evidence in support of this finding: There is testimony of a medical doctor, who is a specialist in poisons and a professor of internal medicine. See his testimony at S.F. 299-310. There is the testimony of a biochemist who was familiar with Lindane and its effect upon humans. See his testimony at S.F. 311-315. There is the testimony of the Director of State of Texas Food and Drug Division, who is a registered pharmacist and chemist. See his testimony at S.F. 269-282, 291-299.

The trial court has found evidence supporting this verdict by his submitting the issue to the jury and entering judgment upon the verdict. The Court of Civil Appeals has expressly found evidence supporting the verdict. See opinion below, 362 S.W. 159 at 163-165.

The judgment was correctly entered upon violations of the "may render injurious" provisions of the city ordinances, state statutes and the federal act.

In addition to the state and city law, there is yet another independent federal ground to support the judgment. The Federal Food, Drug, & Cosmetic Act prohibits *any* amount of Lindane upon milled rice. 21 U.S.C., Section 342(a) (2). That section provides that a food is adulterated "if it bears or contains *any* added poisonous or added deleterious substance, except a pesticide chemical in or on a raw agricultural commodity, which is unsafe within the meaning of

Section 346 of this title, or if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of Section 346 a(a) of this title." By definition, milled rice is not a raw agricultural commodity and the exceptions in this section do not apply. It therefore was adulterated because it contained *any* amount of added poisonous or added deleterious substance, namely Lindane.

The trial court correctly found this to be a violation, as shown by submission of Special Issue No. 1 to the jury on whether the Lindane application was a proximate cause of the damages, not predicated upon any prior finding.

The Court of Civil Appeals' opinion correctly found that the application of any amount of Lindane poison to the milled rice violated this section. 362 S.W. 2d 159 at 164-165.

The case has been correctly decided and does not require review.

2. *The Decision Has No Importance to the Public Or Any Other Parties.*

The act of the exterminating company giving rise to this suit, being the application of the poison Lindane to milled rice in 1955, had not happened before or since. See the opinion below, 362 S.W. 159 at 164. The decision will not affect any other parties and, indeed, will not affect even these parties in the future since there is no occasion for it to recur.

The decision here determines this single incident, and jurisdiction is not exercised for a single episode. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74.

3. *The Question is Foreclosed By Prior Supreme Court Decision.*

The interpretation to be given to the "may render injurious" provisions of the food laws was established by the Supreme Court in *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399.

The trial court in submitting its issue to the jury carefully set out by accompanying instruction the interpretation to be given to the term "may render injurious", taking the instruction almost verbatim from the Supreme Court's opinion in that case. See charge to the jury, Special Issue No. 2 with instruction, at Transcript Vol. I.

In view of this prior decision of the Supreme Court, there is no substantial question or controversy, and jurisdiction should be denied. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311; *Palmer Oil Corp. v. Amerada Corp.*, 343 U.S. 390.

4. *The State Court Followed Supreme Court Decision; No Conflict.*

There is no conflict between the case at bar and the decisions of this Court. To the contrary, the pertinent decision of the Supreme Court in *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, was recognized and applied by the trial court, including its incorporation in charge to the jury. The Court of Civil Appeals in its opinion has recognized and applied this decision. 362 S.W. 2d 159 at 163.

The Supreme Court decision has been followed and there is no conflict to review.

5. *The Only Issue Preserved, A Fact Issue, Has Been Correctly Determined.*

The petitioner did not make any complaint of the judgment other than by motion for judgment non obstante veredicto. Its appeal was solely upon denial of that motion, and it raised only one question, whether there was any evidence to support the verdict and judgment. Any other question was waived for appeal. Rule 324, Texas Rules of Civil Procedure. 362 S.W. 2d 159 at 163-164.

The jury determined the facts against the petitioner. The trial court and the Court of Civil Appeals have found that there was evidence supporting the verdict. 362 S.W. 2d 159 at 163-164.

These determinations are binding. Amendment VII to the Constitution of the United States provides that "no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of the common law."

Where the jury's determination of fact has received concurrence of the trial court and the appellate courts, the Supreme Court does not undertake review *Grater Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275.

CONCLUSION

or the foregoing reasons it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,

CARNES & MARTIN

LAMAR CARNES

BURKE MARTIN

Counsel for Respondent.

1125 Bank of the Southwest Bldg.
Houston 2, Texas

gust 10, 1963

APPENDIX "A"

ORKIN EXTERMINATING COMPANY, INC.,
Appellant,
v.
GULF COAST RICE MILLS, Appellee

No. 13998.

Court of Civil Appeals of Texas

Houston.

Nov. 8, 1962.

Rehearing Denied Nov. 29, 1962.

WERLEIN, Justice.

This suit was brought by plaintiff, Gulf Coast Rice Mills, against Orkin Exterminating Company to recover damages allegedly growing out of breach of contract and negligence of the defendant. Both plaintiff and defendant have perfected appeals to this Court from the judgment rendered by the trial court on the second trial of the case. From the judgment of the District Court rendered on the first trial, an appeal was taken by the defendant, and the judgment was reversed and the cause remanded by the Waco Court of Civil Appeals. Orkin Exterminating Company, Inc. v. Gulf Coast Rice Mills, Tex.Civ.App., 343 S.W.2d 768, dism. w.o.j.

A summary of plaintiff's pleadings, which were identical on both trials, is given in the opinion of the Waco Court. We quote from such summary as follows:

> "Plaintiff alleged that it entered into a written contract with Orkin in 1952 under the terms of which

> Orkin was to exterminate and control insects, rodents, and pests in plaintiff's mill; that in August, 1955, Orkin sprayed plaintiff's mill with an insecticide or pesticide known as Lindane; that Lindane is poisonous and prohibited by law to be so used; that the application of Lindane to the mill rendered the rice unusable; that the use of Lindane on the interior of the mill was negligence; caused the rice to be unfit for use and adulterated; caused the Federal authorities to prohibit sale of the rice; caused the rice to be injurious to health and unsafe within the meaning of the Federal Food and Drug Act. 21 U.S.C.A. § 301 et seq.; that the foregoing were proximate causes of damages suffered by plaintiff which were alleged to be some $96,000 (expense for remilling the rice and loss of profits incurred while so remilling the rice.)."

The plaintiff also alleged violations of certain provisions of the laws of the State of Texas and ordinances of the City of Houston, and pled that Orkin had defaulted and breached its contract in some 17 particulars. These breaches are summarized in the opinion of the Waco Court of Civil Appeals. That Court on the record before it held that the trial court erred in granting the partially instructed verdict for the plaintiff, thereby withdrawing from the jury any issues as to whether defendant breached its contract, or defaulted upon its express or implied warranty, since there were numerous disputed fact issues in the contract and breach of warranty phases of the contract. With respect to the tort phase of the case, the Court held that the record did not support any recovery.

On the second trial, the court overruled plaintiff's and defendant's motions for an instructed verdict, and submitted the case on seven special issues to which the jury found in substance: (1) that the application of Lindane

in August, 1955, to the rice and premises of plaintiff was a proximate cause of damages sustained by plaintiff; (2) that such application to the rice may have rendered it injurious to health; (3) that such application was a proximate cause of plaintiff's damages, and (4) was negligence; (5) that such negligence was a proximate cause of plaintiff's damages; (6) that $27,790.07 was the sum of money that would fairly and reasonably compensate plaintiff for such damages as were caused by application of Lindane to the rice and premises of plaintiff, taking into account (a) cost of remilling the rice, (b) cost of cleaning plaintiff's premises and (c) difference between reasonable market value of rice before and after remilling, directly resulting from the application of Lindane in August, 1955; and (7) that $15,000.00 would fairly and reasonably compensate plaintiff for such damages as were directly and proximately caused by loss of use of plaintiff's mill reasonably and necessarily consumed in remilling the milled rice.

The trial court on hearing defendant's motion for judgment non obstante veredicto, reduced the jury's finding of $27,790.07 in answer to Special Issue (6) to $21,245.32 because plaintiff's pleading limited such items of damages to that amount, and otherwise overruled such motion and entered judgment for plaintiff in the total sum of $36,246.32, being the reduced amount of the verdict plus $1.00 nominal damages for breach of contract insurance provisions.

Orkin contends that the trial court erred in overruling its motion for an instructed verdict and judgment non obstante veredicto when there was no evidence to support any cause of action or legal theory of recovery, and the

law of the case and the evidence showed that the record did not support recovery on the tort phase of the case. Orkin states that the statement of the nature of the case on pages 768-772 of the opinion of the Waco Court is correct and it adopts the same. It asserts that the pleadings and evidence were the same in both trials, except for defendant's additional allegation as to the law of the case made in its third amended original answer filed subsequent to the opinion handed down by the Waco Court. The Waco Court's summary of the evidence adduced on the first trial is as follows:

> "The record reflects that plaintiff Rice Mills entered into a written contract with defendant Orkin Exterminating Company in 1952, under which Orkin was to exterminate insects and rodents in plaintiff's mill; that the insect and rodent situation became so bad that in August, 1955 Orkin sprayed with an insecticide known as Lindane. Thereafter, the Federal Food and Drug Administration and the State Health Department and the City of Houston made some investigation of the use of Lindane at the Rice Mill. All agencies finally in effect delegated to Inspector Moses of the Federal Food and Drug Administration the right to act for them. Inspector Moses told the Rice Mill that the use of Lindane had violated the law; that the Mill was in serious trouble; that the Mill could ship no rice; that such rice was unfit for human consumption; that the rice would be condemned; the buildings padlocked and the Mill and its offices subject to prosecution both civilly and criminally. Inspector Moses' (and the government's) position was that no amount of Lindane was permitted on rice; that no tolerance was established for it, and for that reason the rice was contaminated, and would have to be remiled. The plaintiff Rice Mill relied on what Inspector Moses told it (speaking for the Federal

State and City Health Departments), and without contesting, disputing, or litigating, the validity or legality of the claims of Inspector Moses and/or the 3 Health Departments, plaintiff proceeded to remill the rice at an expense of some $46,245, and during such period lost profits which the jury found to be $40,000.

"As further pertinent, we note that the record reflects that some 95% of the plaintiff's rice was intended for export to a foreign country. The record further reflects that a great many samplings of the rice were tested for Lindane and that the results of such samplings ran from *none* up to 3.6 parts of Lindane per million parts of rice. It is further reflected that such amounts are not injurious to health, in any manner."

It is Orkin's contention that the facts in evidence pertaining to the negligence phase of the case are substantially the same as on the first trial, and that for such reason the specific findings of law made by the Waco Court are binding upon this Court as the law of the case. We think it unnecessary to set out such findings since they may be found on pages 771-772 of the Court's opinion. It is our view that there are some substantial differences between the evidence adduced at the first trial and at the second trial. Several medical witnesses testified on the first trial who did not testify on the second trial. The applicable ordinances of the City of Houston were not introduced on the first trial but were introduced on the second trial. On the second trial, there is no evidence that the City and State agencies delegated to Inspector Moses the right to act for them, although they may have agreed that Federal, State and City food laws have been violated. Other differences will appear in the course of this opinion.

Plaintiff asserts that the answers of the jury to the special issues submitted constitute findings against Orkin on both the contract and tort phases of the case. Plaintiff requested certain more specific issues with respect to breaches of contract by Orkin, which were refused by the trial court. Any error of the trial court in refusing such issues has not been preserved by plaintiff and cannot be considered by this Court. The special issues submitted are limited to the use and application of Lindane and do not encompass any damages resulting from infestation of the rice by insects or rodents.

The contract does not make specific mention of Lindane. It specifies the scope of work and controlled service to be rendered by Orkin, and with respect to material to be used provides: "The materials used shall conform to Federal, State and local ordinances and laws, and shall be acceptable to the rice milling industry." Plaintiff argues that Orkin in using Lindane violated the provisions of the contract and breached its implied warranty to use proper materials, and was guilty of violations of the Federal Food, Drug, & Cosmetic Act, in that (1) it violated 21 U.S.C. § 342(a) (2) since no amount of Lindane whatever was permitted on milled rice; and (2) it violated 21 U.S.C. § 342(a) (1) in that it contained a poisonous and deleterious substance "which may render" the rice injurious to health. Plaintiff further contends that the undisputed evidence also shows violations of the Pure Food laws of the State of Texas and violations of the City of Houston ordinances.

Our inquiry is limited to alleged violations of the contract in the use and application of Lindane and to determining whether there is any evidence supporting the

findings of the jury with respect thereto on either or both the contract and tort phases of the case. We are unable to say as a matter of law that Orkin breached its contract and implied warranty with respect to the infestation of the rice. In this respect we are in accord with the law of the case as determined by the Waco Court. But even if we were to hold that there were such breaches as a matter of law, we would still be unable to determine how much damage resulted therefrom in the absence of a jury finding, and no issues were submitted with respect to such damage, although there was some evidence that the rice would probably have been remilled because of the infestation regardless of the use of Lindane.

Plaintiff pleaded that the spraying of an insecticide or pesticide on plaintiff's rice, rendering it unfit for sale, was a violation of Sections 861-880 of the Houston City Ordinances of 1942. Section 868 of such Ordinances provides that for the purpose of Article IV, entitled "Pure Food & Drugs," an article shall be deemed adulterated (c) Food-(5) "If it contains any added poisons or other added deleterious ingredient which may render such article injurious to health * * *." Section 866 provides: "No person shall, within the City: manufacture for sale, have in his possession with intent to sell or exchange, any article of food or drugs which is adulterated or misbranded within the meaning of this article." Section 873 provides for prosecution and punishment for violations of the foregoing sections.

The record in this case reflects that Lindane is a poisonous or deleterious ingredient and that it was added to the rice by Orkin in blowing Lindane dust all over the rice in plaintiff's mill. It was not necessary to show that the

food containing an added poisonous or deleterious substance must affect the public health in order for it to be condemned. All that need be established is that the added poisonous or deleterious substance must be such as may render such article injurious to health. United States v. Lexington Mill & Elevator Co., 232 U.S. 399, 34 S.Ct. 337, 58 L.Ed. 658. There is substantial evidence showing that Lindane in any quantity on rice may render such article injurious to health. The jury's finding to Special Issue No. 2 finds support in the evidence. There is no assignment that any of the jury's findings are against the weight and preponderance of the evidence, and if there were such assignment, we could not consider it since defendant appeals from the court's refusal to grant an instructed verdict and judgment non obstante veredicto.

Plaintiff also pleaded that by spraying such rice and adulterating it and rendering it unfit for sale, Orkin violated Articles 4471 and 4472 of the Texas Revised Civil Statutes, and Articles 706, 707 and 717 of the Texas Penal Code. These provisions are substantially the same as those provided in the City of Houston ordinances. The violation of such statutes would subject plaintiff to criminal prosecution by the State, and to confiscation of the rice.

There is evidence in the record before us that Orkin applied Lindane to plaintiff's stores of rice, including both milled and unmilled rice. No claim for damages has been made by plaintiff for the unmilled rice, since it would necessarily have to be milled and milling would remove the Lindane.

The Waco Court on the record before it found in effect that there had been no violation of the Federal statutes

relied upon by plaintiff. We think the record on this appeal shows certain violations. Sec. 342 provides: "A food shall be deemed to be adulterated—(a) (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health * * *; or (2) (A) if it bears or contains any added poisonous or added deleterious substance * * * which is unsafe within the meaning of section 346a * * *." The exceptions in Section 342(a) (2) (A) do not apply to milled rice and are inapplicable to the facts of this case. Section 346 with respect to tolerances for poisonous ingredients provides: "Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for the purposes of the application of clause (2) (A) of section 342(a) of this title." The evidence and the record before us show that Lindane was not required in the production of rice and that its use could have been avoided. Indeed, Lindane had been used only once in connection with plaintiff's mill from 1940 to 1955, and then it was used without the knowledge of the plaintiff or the health authorities. From the time of the application in August, 1955 Lindane has not been used down to the date of the second trial in 1961. Moreover, no allowance or tolerance was established for the use of Lindane on milled rice.

Plaintiff asserts that on the second trial the evidence shows that Lindane was on all the samples of rice that were taken and analyzed, except one sample that had been remilled. Even if plaintiff is mistaken in such assertion, there is nevertheless evidence showing that a number of samples were taken and that the results of many samplings showed

from 0.2 to 3.6 parts per million of Lindane, and that the addition of such parts of Lindane to milled rice may render it injurious to health. Manifestly it would be impossible to segregate from the stores of contaminated milled rice in question some unknown quantity of rice that might not have had Lindane on it in such quantities.

[1, 2] Since no tolerance for Lindane on milled rice as applicable to the facts of this case had been established by the Secretary of Health, Education & Welfare, the addition of any amount of Lindane to such milled rice was in violation of Section 342 (a) (2) of the Federal Food, Drug, & Cosmetic Act, and especially so if it may have rendered the rice injurious to health. The Act in question is quite specific, as stated by the Supreme Court of the United States, in the recent case of Flemming v. Florida Citrus Exchange, 358 U.S. 153, 79 S.Ct. 160, 3 L.Ed.2d 188:

> "Here again, in our construction of this explicit Act, we must be sensitive to what Congress has written, and recall that 'It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort.' 62 Cases of Jam v. United States, 340 U.S. 593, 596, 71 S.Ct. 515, 518, 95 L.Ed. 566."

Section 3.41, Title 21, 1955, Code of Federal Regulations, provides: "(a) The amendment in clause (2) of section 402(a) of the Federal Food, Drug, and Cosmetic Act shall become effective on the dates specified for the following pesticide chemicals: * * * (2) Effective date October 31, 1955: * * * Lindane: * * * Grain (tropi treating storage bins)." On the second trial it was established that plaintiff had never had any treating storage bins. The 1954 amendment to Section 342(a) (2) as provided in Section 5 of the Act of July 22, 1954 is applicable to the

facts of the case before us, became effective one year following the date of the enactment of the Act or on July 22, 1955, and was in full force and effect in August, 1955, when the Lindane was applied to plaintiff's rice. Section 120.1(e), Title 21, 1955, Code of Federal Regulations, entitled "Definitions, Interpretations, and Exemptions," provides in substance that the term "Raw agricultural commodities" does not include foods that have been processed, fabricated, or manufactured by cooking, freezing, dehydrating, *or milling*. Since plaintiff's grain had been milled and was not a raw agricultural commodity, no tolerance had been established for it. Therefore, the application of any amount of Lindane was prohibited since it would add to the milled rice a poisonous or deleterious substance that may be injurious to health as shown by the evidence adduced on the second trial.

At the time of the occurrence in question, the Federal Food, Drug, and Cosmetic Act, Section 381(d), 21 U.S.C.A., provided with respect to exports that a food intended for export shall not be deemed to be adulterated or misbranded if it accords to the specifications of the foreign purchaser, is not in conflict with the laws of the country to which it is intended for export, and is labeled on the outside of the shipping package to show that it is intended for export. "But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this chapter." While there is some evidence that as much as 95% of plaintiff's rice had been exported during some prior years, the evidence does not show that the rice in question was labeled for export or that it would necessarily be exported. It was held subject to sale in domestic markets as well as foreign

markets. Furthermore, the undisputed testimony of plaintiff's general manager Smith who negotiated contracts with foreign buyers, was to the effect that he could not have sold to any foreign purchasers any rice containing Lindane.

[3] Defendant contends, however, that plaintiff voluntarily remilled its rice, and that it was not forced to do so by the Federal, State or City authorities. We think this contention is without merit. Under the evidence adduced on the second trial, it appears that plaintiff was placed in such position by Orkin that it could not keep the rice in its possession, sell or exchange the same without being subject to criminal prosecution and punishment under Section 873 of the Ordinances of the City of Houston, and under Article 717, Texas Penal Code. Additionally, the rice could be condemned, confiscated, forfeited and destroyed under Article 4470, Texas Revised Civil Statues. The evidence shows that the State agency was prepared to take action if plaintiff's rice was sold or offered for sale with Lindane on it. Also, the shipment of such rice in interstate commerce would have subjected plaintiff to penalties under Sections 333 and 334 of the Federal Act. Having placed the plaintiff in the situation where it could neither retain nor sell the rice in question without violating the Pure Food laws of the City, State and Federal governments, and subjecting itself to prosecution and penalties, the defendant is not in a position to urge that plaintiff acted voluntarily and not under coercion in remilling the rice and thereby preventing such prosecution and penalties, and at the same time mitigating the damages which might have resulted from confiscation and destruction of the rice by the State or other governmental authority.

[4] The cases cited by defendant with respect to voluntary payments are inapplicable to the factual situation in the present case. The retention or sale or offer to sell the rice in question constituted a violation of law, making plaintiff's action necessary to avoid prosecution, penalties and seizure of the rice. Under these circumstances plaintiff's act in remilling the rice was not voluntary but coerced as a matter of law. Where one risks prosecution, penalties and forfeiture of his property for noncompliance with law, his act in complying cannot be said to be voluntary. National Biscuit Co. v. State, 134 Tex. 293, 135 S.W.2d 687; Crow v. City of Corpus Christi, 146 Tex. 558, 209 S.W.2d 922; District of Columbia v. American Security & Trust Co., 292 U.S. App. D.C. 33, 202 F.2d 21; St. John's Electric Co. v. City of St. Augustine, Fla., 81 Fla. 588, 88 So. 387; 17-A Amer. Jur. Duress and Undue Influence §§ 7, 14, p. 875; 21 Tex. Jur. 2d Duress & Coercion § 2, p. 116.

[5] Plaintiff on its appeal complains that the trial court erred in excluding certain evidence relative to lost profits and in denying its motion for lost profits before judgment. We have been unable to find in the record any request by plaintiff for submission of any issue on lost profits as such. The answer of the jury to Special Issue No. 7 awarding damages in the sum of $15,000.00 for the loss of use of plaintiff's mill consumed in remilling the milled rice necessarily includes lost profits. No judgment for lost profits in any other amount could have been entered without plaintiff's compliance with Rule 301, Texas Rules of Civil Procedure. There was no such compliance.

[6] Plaintiff has cited a number of cases in support of the rule that where a business is already established and

making a profit, it is permissible to show the amount of business done in corresponding periods of time not too remote, and the rule that uncertainty of proof as to the amount of lost profits will not defeat recovery so long as there is no uncertainty as to the fact of legal damages. These general rules are not questioned by defendant. In the instant case plaintiff's witness was asked to give oral testimony from some records as to the amount of rice purchased by plaintiff in October, November and December of 1953, to which question defendant objected because there had been no showing of any comparison between conditions during such period of time and the period of time in issue in this law suit. The objection was sustained. Plaintiff's witness was also asked whether he had an opinion as to the amount of rice he would have bought, to which question the defendant objected as not being based upon facts. No other evidence along such line was offered, although in its bill of exception in the jury's absence such witness testified that he thought "it would be reasonable to suppose" that they would have bought at least 100,000 additional barrels and that he thought "it is reasonable to suppose we would have made at least 50 cents a barrel." We cannot say that the court improperly excluded such testimony, but if there was any error in such connection, we think the exclusion was not harmful in view of all the records and testimony relative to earnings and profits of the business that were admitted in evidence.

[7] In its sixth Point, plaintiff asserts that the court erred in denying interest before judgment upon its damages. Plaintiff sued not only for its damages but for interest thereon as damages. It states in its brief that it continued to sustain damages until June 7, 1956. It is our view that

the plaintiff is entitled as a matter of law to 6% interest as damages on the $36,246.32 from that date until date of judgment such interest amounting to $12,239.17. The Texas Co. v. The State of Texas, 154 Tex. 494, 281 S.W. 2d 83; Watkins v. Junker, 90 Tex. 584, 40 S.W. 11; Tortuguero Logging Operation, Ltd. v. Houston, Tex. Civ. App., 349 S.W.2d 315; Ewing v. Wm. L. Foley, Inc., 115 Tex. 222, 280 S.W. 499, 44 A.L.R. 627.

[8] We think there is no merit in plaintiff's contention that it was entitled to a directed verdict or in its contention that the court erred in granting a partial summary judgment for defendant in connection with plaintiff's claim for gross negligence and exemplary damages. A careful review of the record shows that there is no evidence that would warrant submission of an issue in connection with alleged gross negligence on the part of the defendant.

The judgment of the Trial Court is reformed by adding thereto interest to date of judgment in the sum of $12,239.17, and, as reformed is affirmed.

APPENDIX "B"

FEDERAL FOOD, DRUG, and COSMETIC ACT.
21 U.S.C., Section 342

"Section 342. *Adulterated Food.*

A food shall be deemed to be adulterated—

(a) Poisonous, insanitary, etc., ingredients.

(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health, but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) if it bears or contains any added poisonous or added deleterious substance, except a pesticide chemical in or on a raw agricultural commodity, which is unsafe within the meaning of section 346 of this title, or if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of section 346a (a) of this title;

APPENDIX "C"

120 C. F. R., Sec. 120.1

(e) * * * Raw agricultural commodities include, among other things, fresh fruits, whether or not they have been washed and colored or otherwise treated in their unpeeled natural form; vegetables in their raw or natural state, whether or not they have been stripped of their outer leaves, waxed, prepared into fresh green salads, etc.; grains, nuts, eggs, raw milk, meats, and similar agricultural produce. It does not include foods that have been processed, fabricated, or manufactured by cooking, freezing, dehydrating, or milling.

* * *